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THE NULLITY OF THE DEFINITIVE SENTENCE IN THE JURISPRUDENCE OF THE TRIBUNAL OF THE ROMAN ROTA

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SUMMARY — Recognizing the generality of the motives of nullity of the sentence established in legislation, the A. explains the need for grasping the common jurisprudence of the Roman Rota in order to administer justice when the nullity of the sentence is alleged. After elucidating the general principles employed by the Rota in this question, he provides an organized discussion of what typically does and does not cause the nullity of the sentence according to Rotal jurisprudence. The motives for nullity are explored thematically, namely, as defects in the judge, the parties, the object of the trial, the process itself, and the sentence itself.

RÉSUMÉ — Reconnaissant la généralité des motifs de nullité de la sentence établie par la loi, l'auteur explique la nécessité de saisir la jurisprudence commune de la Rote romaine pour administrer la justice quand la nullité de la sentence est invoquée. Après l'élucidation des principes généraux employés par la Rote dans cette question, il fournit une discussion organisée de ce que fait habituellement et ne provoque pas la nullité de la sentence selon la jurisprudence de la Rote. Les motifs de nullité sont explorés par thèmes, comme les déficiences du juge, les parties, l'objet de l'essai, le processus lui-même et la sentence elle-même.

Introduction

There are a variety of situations that can cause the nullity of the judicial sentence; and while some of these are quite specific and concrete—e.g., the lack of the signatures of the judges—others are notably indeterminate.

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For instance, the denial of the right of defence and the nullity of another judicial act as motives of nullity admit innumerable possibilities, while questions such as absolute incompetence and the defect of a judicial petition imply many technical questions that cannot be suitably or succinctly addressed in the legislative *corpus*.[1] Moreover, the norms governing the nullity of the sentence are in fact largely procedural in nature—that is, they prescribe how to go about alleging and adjudicating the question of the nullity of the sentence—while only two of the canons from that chapter are substantive in nature—that is, they state the motives for the nullity of the sentence—namely, canons 1620 and 1622 (*CCEO* cc. 1303, §1; 1304, §1).[2] These dynamics in canonical legislation lead one to appreciate the necessity for a clear and universal jurisprudence on the matter of the nullity of the sentence. Without such jurisprudence, the juridical institute of the *querela nullitatis* is at risk of being misunderstood or even abused.

In the first place, without the guidance of such jurisprudence, the question of the nullity of the sentence would be subject to *jurisdictional arbitrariness*. It is true that the judicial function entails the use of prudence and reliance on canonical equity; but the judgement about the alleged nullity of the sentence must be made in a truly judicial manner. It is reached on the basis of the standard of moral certitude in light of what has been carried out and proven (*ex actis et probatis*). This moral certitude is *in iure et in facto*, which demands not only that the judge be able to evaluate what occurred in the process that could allegedly cause the nullity of the sentence (*in facto*), but also that he do so by employing correct juridical principles (*in iure*). These principles are at times evident in the law itself, but other times they are not.

[1] Cf. Joaquín LLOBELL, "La certezza sul proprio stato matrimoniale e la nullità della sentenza," in *L'atto giuridico nel diritto canonico*, Studi Giuridici 59, Vatican City, LEV, 2002, p. 275 (= LLOBELL, "La certezza sul proprio stato matrimoniale e la nullità della sentenza"); IDEM, "Perfettibilità e sicurezza della norma canonica. Cenni sul valore normativo della giurisprudenza della Rota Romana nelle cause matrimoniali," in PONTIFICIUM CONSILIUM DE LEGUM TEXTIBUS INTERPRETANDIS (ed.), *Ius in vita et in missione Ecclesiæ. Acta Symposii Internationalis Iuris Canonici, in Civitate Vaticana celebrati diebus 19-24 aprilis 1993*, Vatican City, LEV, 1994, pp. 1255-1256 (= LLOBELL, "Perfettibilità e sicurezza della norma canonica"); Antoni STANKIEWICZ, "Chapter I. The Plaint of Nullity of the Judgement," in *Exegetical Comm*, vol. IV/2, p. 1545 (= STANKIEWICZ, "Chapter I. The Plaint of Nullity of the Judgement"). In jurisprudence, see ROMANÆ ROTÆ TRIBUNAL (RRT), Decretum *c.* BOCCAFOLA, 17 October 1991, no. 9, in *RRT Decr*., 9 (1991), p. 131; Decretum *c.* BURKE, 7 May 1998, no. 3, *RRT Decr*., 16 (1998), pp. 125-126.

[2] Cf. José María SERRANO RUIZ, "La querela di nullità contro la sentenza," in *Il processo matrimoniale canonico*, 2nd ed., Studi Giuridici 29, Vatican City, LEV, 1994, p. 763 (= SERRANO RUIZ, "La querela di nullità contro la sentenza").

Secondly, without a clear and universal jurisprudence, the truly valid acts of the judge may be vulnerable to inappropriate challenges. No less harmful than jurisdictional arbitrariness are the baseless allegations of the parties—whether public (defender of the bond, promoter of justice) or private (e.g., the spouses, the accused, etc). Plaints of nullity proposed without the proper juridical rationale hinder the administration of justice in the Church and may be of little service to the public good or the salvation of souls. It can also happen that a plaint of nullity is presented before a judge who lacks the necessary knowledge of what renders a sentence null and who is swayed by the convincing though erroneous arguments of the complainant, thus leading to the wrongful declaration of nullity of the sentence.

Thirdly, such jurisprudence is necessary in order to create a unity of jurisprudence between local tribunals, especially of those that are hierarchically related. Without such jurisprudence there is risk not only of division and animosity among neighbouring ministers of tribunals but also the bewilderment of the faithful. When the faithful approach the tribunal—usually to clarify their state of life in the Church—they have the right to the correct administration of justice. Significant violations of procedural law on the one hand, and the wrongful declaration of nullity of the sentence on the other, compound the pain that is already present because of the judicial contention. It is shameful when this pain is caused by the Church's judiciary itself, thus tarnishing her identity as the *speculum iustitiæ* in the world.

For these reasons, it is necessary for there to be a sound and universal jurisprudence on the matter of the nullity of the sentence. This is not, however, a question of a *lacuna legis*, since the supreme legislator has already implicitly entrusted this task to the Tribunal of the Roman Rota, which "provides for a unity of jurisprudence and, by means of its sentences, aids lower tribunals."[3] It is thus incumbent upon ministers of tribunals, in accord with article 35, §3 of the Instruction *Dignitas connubii*, to study this jurisprudence with regularity.[4]

[3] JOHN PAUL II, Constitutio Apostolica de Romana Curia *Pastor bonus*, 28 June 1988, art. 126, in *AAS*, 80 (1988), p. 892: "Hoc Tribunal … unitati iurisprudentiæ consulit et, per proprias sententias, tribunalibus inferioribus auxilio est." Here the term *sententia* should be taken in a general sense, inclusive of decisional or interlocutory decrees.

[4] A preliminary note on the sources for this jurisprudence is in order. The principal source is the series of the Roman Rota's decrees addressing procedural questions (*de ritu*) published by the Rota itself: ROTÆ ROMANÆ TRIBUNAL, *Decreta selecta inter ea quæ anno […] prodierunt cura eiusdem Apostolici Tribunalis edita*; as of this writing, 17 volumes have been published, including decrees issued during the years 1983-1999. Another source of equal juridical value but much less abundance (there are only about 2-5 decisions *nullitatis sententiæ* per volume, if any) is ROTÆ ROMANÆ TRIBUNAL, *Decisiones seu sententiæ*

The present study attempts to encapsulate a *consolidation* of the substantive jurisprudence of the Roman Rota on the question of the nullity of the sentence from the period of 1983 to the present. It is always worthwhile to study a decision issued in an individual case and draw out the principles and methodology used in it. The very nature of canonical jurisprudence, however, lies in the common decision-making pattern among several judges and its continuity over the course of time. An individual act of a Rotal *Turnus*, therefore, does not constitute "Rotal jurisprudence" on a particular question; it only enunciates the jurisprudence of the Roman Rota on a particular question to the extent that it demonstrates or contributes to the common and constant jurisprudence of that apostolic tribunal.[5] Thus, in order to be able justly to identify the Rota's jurisprudence regarding the nullity of the definitive sentence, this study has been based on a near comprehensive examination of the Rota's acts on this question issued from 1983 to the present. That being said, it should be noted that the limitation of this study to the period of 1983 to the present by no means implies that the jurisprudence preceding this period is of less importance or value; indeed, there is much continuity there that is itself worthy of detailed study. The purpose of this limitation is related to the fact that the current substantive norms concerning the nullity of the sentence constitute an integral recordering of the *ius vetus* on the matter;[6] it thus aims to illustrate what is the jurisprudence related explicitly to the *ius vigens*.

selectæ inter eas quæ anno […] prodierunt cura eiusdem Apostolici Tribunalis editæ, the most recent volume of which publishes sentences issued in the year 2003.

Other sources include these: Antonio FANELLI, *Relatio super jurisprudentia de ritu in Decisionibus Incidentibus et Præliminaribus latis a Tribunali Apostolico Rotæ Romanæ, a nova Codificatione Juris Canonici usque ad præsentiarum*, partes I, III and IV, Vatican City, LEV, 2003, 2000, and 2005 (respectively) (pars IV will be cited below as FANELLI, *Relatio*-IV); and the "Relazione sull'attività della Rota Romana nell'anno giudiziario […]," now published annually in *QSR*, the journal of the Studium Rotale. The latter source does not provide the name of the Rotal *Ponens*, the date of the Rota's act, or the tribunal of origin, only the number attributed to the act for that year (e.g., B. 47/06). In addition, individual decrees and sentences are published periodically in canonical journals.

5 Cf., e.g., Raymond L. BURKE, *Lack of Discretion of Judgment Because of Schizophrenia: Doctrine and Recent Rotal Jurisprudence*, Analecta Gregoriana 237, Rome, Editrice Pontificia Università Gregoriana, 1986, pp. 21-24, esp. at note 26; Carlo GULLO, "Interpretazione evolutiva o evoluzione del diritto? Contributo alla teoria dell'interpretazione nel diritto canonico," in *EIC*, 26 (1970), pp. 367-375; LLOBELL, "Perfettibilità e sicurezza della norma canonica," *cit*. (*vide supra* note 1), pp. 1247, 1257; Rafael RODRÍGUEZ-OCAÑA, "El Tribunal de la Rota Romana y la unidad de la jurisprudencia," in *IC*, 60 (1990), pp. 437-440; Zaccaria VARALTA, "De iurisprudentiæ conceptu," in *Per*, 62 (1973), pp. 49-50.

6 See *CIC*/17 cc. 1892, 1894; PIUS XII, Motu proprio de iudiciis pro Ecclesia orientali *Sollicitudinem Nostram*, 6 January 1950, cc. 418 and 420, in *AAS*, 42 (1950), pp. 90, 91.

The material is divided into six sections: 1) the nullity of the sentence *in general*, 2) nullifying defects in *the judge*, 3) nullifying defects in *the parties*, 4) nullifying defects in *the object of the trial*, 5) nullifying defects in *the process itself*, and 6) nullifying defects in *the sentence itself*.[7] Throughout this study, the reader will find illustrations not only of the nullity of the sentence but related situations in which nullity does not arise. This helps both to clarify the proper meaning of the defect of nullity and to underscore the point that, due to the odious character of nullity, some procedural defects do not cause the nullity of the sentence.

1 — *The Nullity of the Sentence in General*

The ecclesiastical definitive sentence, as a juridical act of the judicial power of governance, is an act endowed with notable authority and dignity. For, beyond the scope of a decision in the secular judiciary, it touches upon the rights and sometimes even directly upon the spiritual good of members of Christ's faithful. Judicial power in the Church is conferred upon ecclesiastical authorities by Christ through apostolic succession, and as such it is an instrument for shepherding the flock entrusted to the care of the Church's

[7] This more thematic, less exegetical approach is increasingly utilized in doctrine, though different categories are employed. CARMELO DE DIEGO-LORA distinguishes in c. 1620 between "the subjective requirements for the judge (1º and 2º), the parties (5º and 6º), and the object (8º)," the initiative of the party (4º), the right of defence (7º), and the freedom of the judge (3º) ("Chapter I. The Plaint of Nullity of the Judgement," in *CCLA2*, p. 1268; cf. *RRT Decr.*, 6 [1988], p. 124, at no. 4).

Carlo and Alessia GULLO generally distinguish between essential elements of the sentence and solemnities established by law; these are divided into the sub-categories of "objective presuppositions" (c. 1620, 1º and 7º), "presuppositions of the sentence" (c. 1622, 2º and 5º), defects in the subjects (cc. 1620, 2º-6º; 1622, 1º and 6º), defect in the object of the trial (c. 1620, 8º), and defects in the solemnities required by law (c. 1622, 3º-4º) (*Prassi processuale nelle cause canoniche di nullità del matrimonio. Terza edizione aggiornata con l'Instr. "Dignitas connubii" del 25 gennaio 2005*, Studi Giuridici 80, Vatican City, LEV, 2009, pp. 270-276) (= GULLO-GULLO, *Prassi processuale*).

José María SERRANO RUIZ distinguishes between those defects that pertain to the fundamental personal dignity of the participants in the process (3º-7º), to their role in the canonical order and in the process (1º-2º), to the nature of the procedural relationship (4º-7º), and to the object of the trial (4º and 8º) ("La querela di nullità contro la sentenza," *cit.* [*vide supra* note 2], pp. 765-766).

In one collection of papers, the distinction is made between defects pertaining to the judge or his decision (1º-3º, 8º), defects pertaining to the parties (4º-6º), and defects pertaining to the procedure (7º) (*La "querela nullitatis" nel processo canonico*, Studi Giuridici 69, Vatican City, LEV, 2005, p. 5) (= *La "querela nullitatis" nel processo canonico*).

pastors. Its exercise is a *munus* that is conveyed especially to provide aid to those particularly human situations that arise among the faithful.[8] It even has an immediate impact on the *bonum animarum*, especially when the status and fundamental rights of the faithful are in question.[9] This power is bestowed concretely by means of election to the papacy in the case of the Supreme Pontiff, the supreme judge of the Church, election to the tribunal of the synod of bishops of a patriarchal or major archiepiscopal Eastern Church *sui iuris*, episcopal ordination and the reception of the office of diocesan bishop, and the provision of the office of judge. The last mentioned enjoy the vicarious judicial power of the Roman Pontiff (in the case of judges of the apostolic tribunals or apostolic delegate judges) or of the bishop who appointed them (in the case of judges of the particular church or delegate judges). And certain superiors of clerical religous institutes of pontifical right also have judicial power in virtue of their office.[10]

From the constitutional perspective, it is for these reasons that a definitive sentence issued by an ecclesiastical judge cannot lightly be declared null. Indeed, the declaration of nullity of an ecclesiastical sentence is an odious thing. As is regularly emphasized in jurisprudence,[11] the guiding, oft-invoked

[8] "La funzione giudiziale della *sacra potestas* concessa dal Salvatore alla Chiesa, come complemento necessario della funzione legislativa, è legata anche al carattere profondamente umano della Chiesa che, pur essendo santa, è tuttavia soggetta a manchevolezze nelle sue membra" (PAUL VI, Allocutio ad Prælatos Auditores, Officiales et Advocatos Tribunalis Sacræ Romanæ Rotæ, novo litibus iudicandis ineunte anno coram admissos, 12 February 1968, in *AAS*, 60 [1968], p. 203).

[9] Cf., e.g., RRT, Decretum *c*. DAVINO, 28 May 1993, no. 6, in *RRT Decr*., 11 (1993), p. 122; Decretum *c*. MONIER, 22 February 2002, B.Bis 13/02, no. 7, in FANELLI, *Relatio*-IV, p. 117.

[10] Cf. *CIC*/83 cc. 331; 381, §2; 391; 1419, §§1-3; 1420, §1; 1421; 1427; 1438-1439; 1442; 1512, 3º; *CCEO* cc. 110, §2; 152; 191; 1058; 1062-1064; 1066-1068; 1086, §§1-3; 1087.

[11] Cf., e.g., RRT, Decretum *c*. SERRANO RUIZ, 15 March 1985, no. 5, in *RRT Decr*., 3 (1985), pp. 86-87; Decretum *c*. PALESTRO, 9 February 1986, no. 3, in *RRT Decr*., 4 (1986), p. 95; Decretum *c*. BRUNO, 31 October 1986, no. 2, in *ibid*., p. 164; Sententia interlocutoria *c*. STANKIEWICZ, 31 January 1989, no. 7, in *RRT Dec*., 81 (1989), p. 96; Decretum *c*. BOCCAFOLA, 26 October 1989, no. 6, in *RRT Decr*., 7 (1989), p. 171; Decretum *c*. CORSO, 16 January 1990, no. 6, in *RRT Decr*., 8 (1990), p. 8; Decretum *c*. CORSO, 17 October 1990, no. 2, in *ibid*., p. 143; Decretum *c*. CIVILI, 13 March 1991, no. 2, in *RRT Decr*., 9 (1991), p. 35; Sententia interlocutoria *c*. BRUNO, 5 February 1992, no. 5, in *RRT Dec*., 84 (1992), p. 40; Decretum *c*. SERRANO RUIZ, 9 July 1992, no. 2, in *RRT Decr*., 10 (1992), p. 166; Decretum *c*. FALTIN, 3 March 1994, no. 9, in *RRT Decr*., 12 (1994), pp. 22-23; Decretum *c*. JARAWAN, 9 February 1996, no. 3, in *RRT Decr*., 14 (1996), p. 25; Decretum *c*. DEFILIPPI, 25 February 1997, no. 8, in *RRT Decr*., 15 (1997), p. 175; Decretum *c*. LÓPEZ-ILLANA, 18 February 1998, no. 8, in *RRT Decr*., 16 (1998), p. 35; Decretum *c*. ERLEBACH, 7 May 1998, no. 2, in *ibid*., p. 130; Decretum *c*. DEFILIPPI, 14 May 1998, no. 6, in *ibid*., pp. 146-147; Sententia definitiva *c*. DEFILIPPI, 27 November 1998, no. 3, in *RRT Dec*., 90 (1998), p. 789; Decretum *c*. SERRANO RUIZ, 7 May 1999, no. 3, in *RRT Decr*., 17 (1999), pp. 111-112; Sententia interlocutoria

principle at play is *potius valeat quam pereat*, since the nullity of an act of ecclesiastical power is harmful to the public good. The norms regulating the nullity of the sentence are subject to a strict interpretation since the declaration of nullity of an act of a judge is akin to the imposition of a penalty upon him in the exercise of his public function and upon the parties who can no longer trust in the juridical stability of the challenged sentence (cf. *CIC* c. 18; *CCEO* c. 1500). Canonical tradition even uses the expression *sub pœna nullitatis* to refer to the invalid exercise of power.[12] It should be noted, though, that it is not technically a penalty, since the consideration of the nullity of the sentence does not include an investigation as to whether or not the judge is morally culpable in perpetrating violations of the law.[13]

In individual Rotal decrees deciding this question, the odious nature of the declaration of nullity of the sentence is emphasized whether the ultimate decision is affirmative or negative—that is, whether the nullity of the sentence is or is not proven (*constat*/*non constat de nullitate sententiæ*). In the case of an affirmative decision, this indication serves to underscore the gravity of the offences perpetrated by the inferior tribunal(s). In the case of a negative decision, this indication serves to justify the conclusion that, although procedural violations may have occurred, the presumed validity of the judge's act must be prevail.

Indeed, in virtue of the principle of the conservation of acts according to which the legislator presumes that all juridical acts are valid until proven otherwise (*CIC* c. 124, §2; *CCEO* c. 931, §2), the sentence cannot be declared null until this nullity is proven to the exclusion of all prudent doubt.[14] Nor can the violation of one or more procedural laws—however illegitimate this may be—induce a presumption that the sentence is null, since only those laws that expressly establish the nullity of an act can lead to this conclusion (*CIC* c. 10; *CCEO* c. 1495). Moreover, if there is doubt about the invalidating consequences of a violation of the law, the presumed validity of the sentence must be sustained (cf. *CIC* c. 14; *CCEO* c. 1496).

c. LÓPEZ-ILLANA, 13 December 2000, no. 7, in *RRT Dec*., 92 (2000), p. 754; Decretum *c*. STANKIEWICZ, 8 March 2002, B.Bis 18/02, no. 11, in FANELLI, *Relatio*-IV, p. 121.

[12] See, e.g., SACRED CONGREGATION OF THE COUNCIL, Instructio *Cum moneat Glossa*, 22 August 1840, in *Fontes*, vol. VI, no. 4069, p. 345; SECRETARY OF STATE, Lex propria Sacræ Romanæ Rotæ et Signaturæ Apostolicæ de mandato speciali SS.mi, 29 June 1908, c. 32, §3, in *AAS*, 1 (1909), p. 29; *CIC*/17, cc. 991, §2; 1680, §1; *CIC*/83, c. 1598, §1.

[13] "… in iure canonico … nullitas actus iuridici, sententia iudiciali haud excepta, tamquam pœna proprie dicta considerari nequit …. Nam legis irritantis (cf. can. 10) violatio effectum nullitatis sortitur, etiamsi violatori in culpam moralem haud fuerit imputata" (RRT, Decretum *c*. STANKIEWICZ, 27 May 1994, no. 17, in *RRT Decr*., 12 [1994], p. 124).

[14] Cf. RRT, Decretum *c*. ERLEBACH, 7 May 1998, no. 2, in *RRT Decr*., 16 (1998), p. 130.

In sum, "Since a plaint of nullity is an extraordinary remedy of law and alleges the nullity of an act, it is subject to a strict interpretation, just like all invalidating and juridically incapacitating laws."[15]

Because of the gravity of the declaration of nullity of an ecclesiastical sentence, this matter is carefully and deliberately regulated by the supreme legislator. A sentence cannot be declared null for a reason developed at the whim of the judge; for the canonical order promotes the juridical stability of the sentence, and this cannot be eroded in a way that circumvents the prerogative of the legislator in such a serious matter. "It is therefore never lawful to declare the nullity of an act, or to extend it to other grounds, unless this nullity is clearly established by law."[16] "[S]ince the grounds of nullity of the sentence concern an odious matter, they cannot be extended by analogy."[17] Even when the judge finds himself faced with a cause in which the violation of the procedural laws does render the sentence null, this cannot be declared perfunctorily but must be done in a well-motivated manner: "[I]t is evident that the nullity of the sentence can be pronounced only with compelling arguments."[18]

In saying that only those defects of nullity established in the law may be the basis for declaring the nullity of the sentence, this does not mean that these defects are found explicitly in canons 1620 and 1622 (*CCEO* cc. 1303, §1; 1304, §1). Authors state that the cited canons enumerate the motives of the nullity of the sentence *taxatively*, but not *exclusively*,[19] which is to say

[15] RRT, Decretum *c*. AGUSTONI, 17 March 1976, no. 3, B. 32/76, cited in *RRT Decr*., 10 (1992), p. 84. All translations are the author's.

[16] RRT, Decretum *c*. CORSO, 16 January 1990, no. 6, in *RRT Decr*., 8 (1990), p. 8. Cf., e.g., Decretum *c*. PALESTRO, 9 February 1986, no. 3, in *RRT Decr*., 4 (1986), p. 95; Decretum *c*. BRUNO, 31 October 1986, no. 11, in *ibid*., p. 167; Decretum *c*. CORSO, 17 October 1990, no. 2, in *RRT Decr*., 8 (1990), p. 143; Decretum *c*. CIVILI, 13 March 1991, no. 2, in *RRT Decr*., 9 (1991), p. 35; Decretum *c*. BOCCAFOLA, 17 October 1991, no. 6, in *ibid*., pp. 129-130; Decretum *c*. RAGNI, 19 October 1993, no. 5, in *RRT Decr*., 11 (1993), p. 162; Decretum *c*. RAGNI, 26 October 1993, no. 5, in *ibid*., p. 174; Decretum *c*. JARAWAN, 9 February 1996, no. 3, in *RRT Decr*., 14 (1996), p. 25; Decretum *c*. SERRANO RUIZ, 7 May 1999, no. 3, in *RRT Decr*., 17 (1999), p. 112. This is part of the juridical patrimony of the Roman Rota; see, e.g., Sententia definitiva *c*. JULLIEN, 19 January 1929, no. 6, in *RRT Dec*., 21 (1929), p. 41; Sententia definitiva *c*. BRENNAN, 27 November 1958, no. 3, in *RRT Dec*., 50 (1958), p. 660.

[17] RRT, Decretum *c*. LEFEBVRE, 17 July 1976, no. 8, cited *passim*; e.g., in *RRT Decr*., 15 (1997), p. 156, no. 10.

[18] RRT, Decretum *c*. BRUNO, 31 October 1986, no. 2, in *RRT Decr*., 4 (1986), p. 164; this text is frequently cited in jurisprudence.

[19] On this point, cf., e.g., Gianpaolo MONTINI, *De iudicio contentioso ordinario. De processibus matrimonialibus. Pars dynamica*, 3rd ed., Rome, EPUG, 2012, pp. 475-476 (= MONTINI,

they list each basic cause for nullity without attempting to foresee every possible scenario (*factispecies*) in which they can arise, and without accounting for defects that can cause nullity *ex natura rei*—which will be discussed shortly. The legislator imposes certain requirements on the judge for the valid placing of particular acts throughout the procedural system, and most of these are not expressed in the general norms governing the *querela nullitatis*. Some of these, in themselves, cause the remediable nullity of the definitive sentence since they constitute a null act of the judge upon which the sentence is based (e.g., *CIC* cc. 1437, §1; 1514; 1598, §1). Others can entail the denial of the right of defence, such as the non-intervention of the defender of the bond in a cause of the nullity of marriage (cf. *CIC* c. 1433). Others may cause a nullifying defect in the judge himself (e.g., *CIC* c. 1447). Also, the use of the oral (or summary) contentious process in causes of the nullity of marriage causes the nullity of the sentence.[20]

In addition to the explicit norm of positive law, there may even be defects of nullity that are implicit in the law or evident *ex natura rei*. There are two common and typical examples of these in Rotal jurisprudence. A defect of nullity that is implicit in the law flows from the rule that no appeal can be

De iudicio contentioso ordinario); Pio Vito PINTO, *I processi nel Codice di diritto canonico: Commento sistematico al Lib. VII*, Vatican City, Pontificia Università Urbaniana, LEV, 1993, pp. 400-401 (= PINTO, *I processi nel Codice di diritto canonico*); STANKIEWICZ, "Chapter I. The Plaint of Nullity of the Judgement," in *op.cit.* (*vide supra* note 1), p. 1545. In jurisprudence, see, e.g., RRT, Decretum *c.* DI FELICE, 9 May 1984, no. 5b, in *RRT Decr.*, 2 (1984), p. 66; Sententia interlocutoria *c.* STANKIEWICZ, 31 January 1989, no. 4, in *RRT Dec.*, 81 (1989), p. 93.

20 See *CIC* c. 1669; *CCEO* c. 1355; *DC* art. 269. On this point, see Gianpaolo MONTINI, "La querela di nullità (artt. 269-278)," in *Il giudizio di nullità matrimoniale dopo l'Istruzione "Dignitas connubii." Parta terza: La parte dinamica del processo*, Studi Giuridici 77, Vatican City, LEV, 2008, pp. 608-610 (= MONTINI, "La querela di nullità"); Zenon GROCHOLEWSKI, "Illegittimo uso del processo sommario come motivo di nullità della sentenza," in *Cause incidentali e processo contenzioso sommario ossia orale nella dinamica della revisione del diritto processuale canonico*, Studia et Documenta Iuris Canonici XIV, Annali di Dottrina e Giurisprudenza Canonica VIII, Rome, Officium Libri Catholici, 1988, pp. 169-175. It has been suggested that the illegitimate use of this process is in fact a question of absolute incompetence (STANKIEWICZ, "Chapter I. The Plaint of Nullity of the Judgement," in *op.cit.* [*vide supra*, note 1], p. 1545).
In some causes judged before the Rota, while the use of the oral contentious process is not explicitly the cause of the nullity of the sentence, it is pointed out that the parties' right of defence is thoroughly denied due to the illegitimate abbreviation of the time limits prescribed by law without the consent of the parties (*CIC*, c. 1465, §2). In one cause, the whole ordinary contentious matrimonial process took just one month! This left no reasonable periods of time for the *contestatio litis*, the presentation of evidence, and the inspection of the acts (RRT, Decretum *c.* BOCCAFOLA, 4 February 1993, no. 13, in *RRT Decr.*, 11 [1993], p. 21).

made against a null sentence (*CIC* c. 1629, 2º; *CCEO* c. 1310, 2º). When the question of the nullity of the first instance sentence is raised before the third instance tribunal and the first instance sentence is declared null, the second instance sentence is necessarily null, since the essential presupposition of the latter is a valid first instance sentence; if the first instance sentence is null, no decision about whether to confirm or reform it can be validly made.[21] Similarly, though not even implicitly in the law, a second instance decree of confirmation issued in a cause of the nullity of marriage (*CIC* c. 1682, §2; *CCEO* c. 1368, §2) is evidently null *ex natura rei* when the prior affirmative sentence is declared null. This has become axiomatic in Rotal jurisprudence: *nullum est confirmare nullitatem; quod non est, confirmari non potest; nemo nullitatem ratificare potest*.[22]

[21] Cf., e.g., RRT, Decretum *c*. FUNGHINI, 24 May 1989, no. 15, in *RRT Decr*., 7 (1989), p. 107; Decretum *c*. DE LANVERSIN, 12 December 1990, no. 14, in *RRT Decr*., 8 (1990), p. 205; Decretum *c*. BRUNO, 27 March 1992, no. 3a, in *RRT Decr*., 10 (1992), p. 52; Decretum *c*. JARAWAN, 23 June 1993, no. 5, in *RRT Decr*., 11 (1993), p. 135; Decretum *c*. STANKIEWICZ, 28 July 1994, no. 20, in *RRT Decr*., 12 (1994), p. 178; Decretum *c*. BRUNO, 25 November 1994, no. 7, in *ibid*., p. 189; Decretum *c*. BRUNO, 21 July 1995, no. 11, in *RRT Decr*., 13 (1995), p. 103; Decretum *c*. FUNGHINI, 24 July 1996, no. 6, in *RRT Decr*., 14 (1996) p. 164; Decretum *c*. BURKE, 22 May 1997, no. 18, in *RRT Decr*., 15 (1997), p. 92; Decretum *c*. PINTO, 22 October 1997, no. 7, in *ibid*., p. 206. In one cause, though, the second sentence was not considered null even in light of the nullity of the first sentence, since the second instance tribunal legitimately added a ground and decided it as if in first instance (Sententia interlocutoria *c*. PALESTRO, 7 February 1990, no. 7, in *RRT Dec*., 82 [1990], p. 88, last paragraph).

Evidently, if the declaration of nullity of the first sentence is reformed by a competent superior tribunal, then the validity of the second sentence is restored (RRT, Decretum *c*. ALWAN, 23 January 2003, B.Bis 2/03, no. 16, in FANELLI, *Relatio*-IV, p. 151).

Taking a different approach, one Rotal decree declared the nullity of the second instance sentence on the basis of the absolute incompetence of the second instance tribunal, which in fact issued a first instance sentence in the case, which was outside of its competence (RRT, Decretum *c*. GIANNECCHINI, 19 July 1991, no. 5, in *RRT Decr*., 9 [1991], p. 106).

[22] Cf., e.g., RRT, Decretum *c*. STANKIEWICZ, 20 January 1983, no. 9, in *ME*, 109 (1984), p. 250; Sententia interlocutoria *c*. POMPEDDA, 27 February 1984, no. 9, in *RRT Dec*., 76 (1984), p. 124; Decretum *c*. COLAGIOVANNI, 21 May 1985, no. 9, in *RRT Decr*., 3 (1985), p. 121; Sententia interlocutoria *c*. POMPEDDA, 23 July 1986, in *RRT Dec*., 78 (1986), p. 482; Decretum *c*. BOCCAFOLA, 13 February 1988, no. 13, in *RRT Decr*., 6 (1988), p. 38; Decretum *c*. SERRANO RUIZ, 1 July 1988, no. 13, in *ibid*., pp. 163-164; Decretum *c*. DORAN, 18 May 1989, no. 14, in *RRT Decr*., 7 (1989), p. 93; Decretum *c*. DORAN, 30 June 1989, no. 10, in *ibid*., p. 140; Decretum *c*. BOCCAFOLA, 25 July 1989, no. 19, in *ibid*., p. 149; Decretum *c*. BURKE, 16 November 1989, no. 10, in *RRT Dec*., 81 (1989), p. 684; Decretum *c*. COLAGIOVANNI, 23 January 1990, no. 5, in *RRT Decr*., 8 (1990), p. 30; Decretum *c*. CORSO, 28 February 1990, no. 9, in *ibid*., pp. 50-51; Decretum *c*. BOCCAFOLA, 16 April 1991, no. 18, in *RRT Decr*., 9 (1991), p. 52; Decretum *c*. DAVINO, 16 May 1991, no. 6, in *ibid*., p. 68; Decretum *c*. BOCCAFOLA, 17 October 1991, no. 14, in *ibid*., p. 133; Decretum *c*. BRUNO, 29 November 1991, no. 3, in

The nullity of the second instance sentence and the decree of confirmation in these examples is what is classically called *derived nullity*, which is distinct from nullity that is inherent (*originaria*) in the sentence itself: "Moreover, the nullity of a sentence can be considered inherent or derived. The former arises from an essential defect of the sentence itself as if due to its own fault; and the latter flows from the nullity of another judicial act on which it depends as its cause."[23] As is noted also in doctrine,[24] most defects of nullity are a matter of derived nullity insofar as the nullity of the sentence is based upon (or derives from) the defect or inexistence of some essential presupposition to the sentence or some formality required prior to the issuance of the sentence (cc. 1620, 1º-7º; 1622, 1º, 5º-6º).[25] The nullity of the sentence is inherent when the sentence itself introduces the defect, namely, when it does not even partially decide the controversy as established in the decree of the formula of the doubt (c. 1620, 8º) or lacks some component or formality required in the sentence by law (c. 1622, 2º-4º). Derived and inherent nullity could also be understood as the nullity that is extrinsic and intrinsic to the sentence, respectively.

Jurisprudence regularly distinguishes between causes of nullity of the sentence that are based on the natural law (*ius naturale* or *ius naturæ*) or

ibid., p. 149; Decretum *c*. DORAN, 2 February 1992, no. 8, in *RRT Decr*., 10 (1992), p. 61; Decretum *c*. BURKE, 11 June 1992, no. 9.1, in *ibid*., p. 122; Decretum *c*. DORAN, 26 November 1992, no. 14, in *ibid*., p. 205; Decretum *c*. BOCCAFOLA, 4 February 1993, no. 15, in *RRT Decr*., 11 (1993), p. 22; Decretum *c*. TURNATURI, 13 June 1996, no. 37, in *RRT Decr*., 14 (1996), p. 124; Decretum *c*. ERLEBACH, 7 May 1998, no. 10, in *RRT Decr*., 16 (1998), p. 133; Decretum *c*. SERRANO RUIZ, 15 May 1998, no. 4, in *RRT Dec*., 90 (1998), p. 377; Decretum *c*. SERRANO RUIZ, 22 March 1999, no. 10, in *RRT Decr*., 17 (1999), p. 90. Cf. Sebastiano VILLEGGIANTE, "Querela di nullità e contestuale appello contro la sentenza affermativa di primo grado," in *ME*, 122 (1997), pp. 311-321.

[23] RRT, Decretum *c*. STANKIEWICZ, 29 November 1995, no. 4, in *RRT Decr*., 13 (1995), p. 153. See also Decretum *c*. HUOT, 21 May 1985, no. 11, in *RRT Decr*., 3 (1985), p. 116; Sententia interlocutoria *c*. STANKIEWICZ, 31 January 1989, no. 4, in *RRT Dec*., 81 (1989), p. 93.

[24] Cf. LLOBELL, "La certezza sul proprio stato matrimoniale e la nullità della sentenza," in *op.cit*. (*vide supra* note 1), p. 275; STANKIEWICZ, "Chapter I. The Plaint of Nullity of the Judgement," in *op.cit*. (*vide supra* note 1), p. 1544.

[25] Some acts of the Rota underscore this explicitly. It has been pointed out, e.g., that the nullity of the sentence due to the denial of the right of defence is a form of derived nullity, since the denial of this right causes the nullity of the process which, in turn, causes the nullity of the sentence resulting from the process (RRT, Decretum *c*. BOCCAFOLA, 25 July 1989, no. 5, in *RRT Decr*., 7 [1989], p. 142; Decretum *c*. BOCCAFOLA, 2 April 1992, no. 4, in *RRT Decr*., 10 [1992], p. 55). Another example is when there is in fact no process at all: the process is null or inexistent, and thus the sentence is null due to derived nullity (Decretum *c*. SABLE, 24 May 1999, no. 6, in *RRT Decr*., 17 [1999], p. 147).

positive law. "The canonical nullity of a juridical act … can flow either from natural law or from positive law—that is, whether elements essentially constitutive of the act itself are lacking, or those solemnities required by some positive law are lacking under pain of nullity."[26] This distinction is suggested in canon 1619 which mentions motives of nullity which are established by positive law (*nullitates actuum, positivo iure statutæ*; cf. *CCEO* c. 1302). The expression "natural law" in this context is not equivalent to the natural moral law, as if certain violations of procedural law directly contravene the divine law written on the heart of every human person. Rather, it refers the nature of things (*natura rerum*), or the very nature of the judicial process, which consists of an ordered exchange between legitimate, equal parties under the moderation of the judge concerning a defined controversy that is definitively resolved by a binding act of the judge. When the sentence that is issued violates one of these essential elements of the process, it is null in virtue of the natural law. Jurisprudence frequently emphasizes that, for example, when the right of defence of one of the parties is denied, the judge's act is null in virtue of the natural law.[27] The supreme legislator also has the right to establish additional defects of nullity of the sentence which, rather than pertaining directly to the nature of the process,

[26] RRT, Decretum *c*. Boccafola, 16 April 1991, no. 8, in *RRT Decr*., 9 (1991), p. 48; Decretum *c*. Boccafola, 4 February 1993, no. 6, in *RRT Decr*., 11 (1993), p. 17; Decretum *c*. Boccafola, 14 July 1998, no. 5, in *RRT Decr*., 16 (1998), p. 264. See also Sententia interlocutoria *c*. Palestro, 7 February 1990, no. 5, in *RRT Dec*., 82 (1990), p. 86.

[27] Cf., e.g., RRT, Sententia definitiva *c*. Mannucci, 27 February 1930, no. 4, in *RRT Dec*., 22 (1930), p. 120; Sententia definitiva *c*. Wynen, 9 March 1955, no. 8, in *RRT Dec*., 47 (1955), p. 220; Decretum *c*. Stankiewicz, 20 January 1983, nn. 6-8, in *ME*, 109 (1984), pp. 247-249; Sententia interlocutoria *c*. Pompedda, 27 February 1984, no. 7, in *RRT Dec*., 76 (1984), p. 123; Sententia interlocutoria *c*. Pompedda, 23 July 1986, no. 7, in *RRT Dec*., 78 (1986), p. 480; Decretum *c*. Agustoni, 7 November 1986, no. 4, in *RRT Decr*., 4 (1986), p. 171; Decretum *c*. Faltin, 25 May 1987, no. 9d, in *RRT Decr*., 5 (1987), p. 82; Decretum *c*. Doran, 19 May 1988, no 5, in *RRT Decr*., 6 (1988), p. 125; Decretum *c*. de Lanversin, 15 June 1988, no. 3, in *ibid*., p. 146; Decretum *c*. Serrano Ruiz, 1 July 1988, no. 4, in *ibid*., p. 159; Decretum *c*. Serrano Ruiz, 14 December 1988, no. 3, in *ibid*., p. 233; Decretum *c*. Jarawan, 25 January 1989, no. 2, in *RRT Decr*., 7 (1989), p. 10; Decretum *c*. Serrano Ruiz, 10 March 1989, no. 3, *ibid*., p. 46; Decretum *c*. Corso, 17 December 1990, no. 2, in *RRT Decr*., 8 (1990), p. 143; Decretum *c*. Doran, 29 November 1990, no. 6, in *ibid*., pp. 188-189; Sententia interlocutoria *c*. Funghini, 29 November 1990, no. 7, in *RRT Dec*., 82 (1990), p. 828; Decretum *c*. Giannecchini, 19 July 1991, no. 2, in *RRT Decr*., 9 (1991), p. 104; Decretum *c*. Doran, 26 March 1992, no. 6, in *RRT Decr*., 10 (1992), p. 44; Decretum *c*. Doran, 2 April 1992, no. 5, in *ibid*., p. 59; Decretum *c*. Ragni, 26 May 1992, no. 5, in *ibid*., p. 104; Decretum *c*. Faltin, 3 March 1994, no. 10, in *RRT Decr*., 12 (1994), p. 23; Decretum *c*. Faltin, 18 May 1994, no. 5, in *ibid*., p. 103; Decretum *c*. Stankiewicz, 27 May 1994, no. 7, in *ibid*., p. 119.

are ancillary to the essential elements; these flow from the positive law established by the will of the canonical legislator.

Jurisprudence has not sought definitively to determine which defects flow from the natural law and which from positive law—the examination of which question is proper to canonical doctrine. In the resolution of the concrete plaint of nullity, the judge's most immediate concern corresponds with the legislator's distinction between whether the defect is sanated by the law itself after the passage of three months from the notification of the publication of the definitive sentence (*CIC* c. 1623; *CCEO* c. 1304, §2), as can occur in causes of the nullity of marriage (*DC*, art. 273),[28] or whether it can be introduced as an action within ten years from the same or perpetually as an exception (*CIC* c. 1621; *CCEO* c. 1303, §2).

In the sections that follow, we will explore the various motives of irremediable and remediable nullity of the sentence treated in the jurisprudence of the Roman Rota when particular causes have been entrusted to its adjudication. The reader will notice that certain grounds of nullity are given no attention. This is due to the fact that no acts of the Rota declaring the nullity of the sentence on a given ground were discovered in the period 1983 to the present; this may be because that factual scenario rarely arises, or because the errors meriting the most attention in the Rota's judgement pertained to a different ground of nullity superseding in importance other possible grounds of nullity.

2 — *Nullifying Defects in the Judge*

> Can. 1620 — A sentence suffers from the defect of irremediable nullity, if:
> 1º—it was issued by an absolutely incompetent judge;
> 2º—it was issued by one who lacks the power of judging in the tribunal in which the cause was decided;
> 3º—the judge issued the sentence coerced by force or serious fear; […].
>
> Can. 1622 — A sentence only suffers from the defect of remediable nullity, if:
> 1º—it was issued by an illegitimate number of judges, contrary to the prescript of canon 1425, §1; […].[29]

[28] The sanation of the definitive sentence that is null because of defects established in positive law, in causes concerning the private good (*CIC* c. 1619; *CCEO* c. 1302), is given little attention in Rotal jurisprudence since most of the causes deferred to it deal with the public good (esp. *Nullitatis matrimonii*).

[29] Can. 1620 — Sententia vitio insanabilis nullitatis laborat, si: 1º lata est a iudice absolute incompetenti; 2º lata est ab eo, qui careat potestate iudicandi in tribunali in quo causa

In this section, defects in the judge that issued the sentence are explored. No examples of the nullity, or even alleged nullity, of the sentence issued in virtue of force or serious fear were discovered in the period of 1983 to the present. The principal defect treated here is the absolute incompetence of the judge which, like the defect of the *potestas iudicandi*, causes the irremediable nullity of the sentence. The defect of a legitimate number of judges, causing the remediable nullity of the sentence, is also discussed.

2.1 — Absolute Incompetence

The jurisdictional foundation for the judge's assumption and adjudication of a judicial cause is what in law is called competence (*competentia*). Incompetence is relative or absolute according to what is prescribed by the legislator, and it is only absolute incompetence that renders the judge's exercise of power invalid or even inexistent.[30] For while the relatively incompetent judge has the power of jurisdiction needed for judging the cause, he is not permitted to use it due to the limitations justly placed by the legislator; on the other hand, the absolutely incompetent judge lacks the very power to judge the cause. Absolute incompetence has a threefold distinction: material (the matter or object of the trial), personal (the parties), and functional (the hierarchical relationship between tribunals).[31] In other words, the judge has no power to adjudicate a cause when the subject matter is not within his competence (e.g., a penal cause judged by a regional tribunal competent only for causes of marriage nullity), when the citation and adjudication of one of the parties (e.g., a bishop)

definita est; 3º iudex vi vel metu gravi coactus sententiam tulit; […]. Can. 1622 — Sententia vitio sanabilis nullitatis dumtaxat laborat, si: 1º lata est a non legitimo numero iudicum, contra præscriptum can. 1425, § 1; […].

30 The allegation of relative incompetence used against the validity of the sentence has rightly been rejected before the Rota (cf., e.g., RRT, Decretum *c*. CIVILI, 23 February 1994, no. 3, in *RRT Decr*., 12 [1994], p. 16; Decretum *c*. STANKIEWICZ, 29 March 1996, no. 8, in *RRT Decr*., 14 [1996], p. 69). In one cause, the recurrent challenged the validity of the act of the respondent's judicial vicar, who consented to the handling of the cause by the tribunal of the petitioner's domicile, due to a defect of motives for granting the consent contrary to the will of the respondent. This, however, does not cause the irremediable nullity of the sentence (cf. Sententia definitiva *c*. BOCCAFOLA, 27 February 1992, no. 5, in *RRT Dec*., 84 [1992], p. 93).

31 "[Absoluta competentia] in iudicibus ecclesiasticis agnoscitur: a) ratione materiæ, i.e. ambitus iurisdictionis Ecclesiæ relate ad forum civile comparatæ; b) ratione personarum, quæ, ob dignitatem vel officium receptum, in foro s.d. 'reservato' iudicantur; c) ratione 'compententiæ functionalis', quæ fundatur in hierarchia diversorum tribunalium a Legislatore institutorum" (RRT, Decretum *c*. DE LANVERSIN, 12 December 1990, no. 6, in *RRT Decr*., 8 [1990], p. 202). See also Decretum *c*. STANKIEWICZ, 24 July 1997, no. 11, in *RRT Decr*., 15 (1997), p. 156.

is reserved to another, or when the judge is juridically incapable to adjudicate the cause at a specific level of jurisdiction (e.g., a strictly appellate judge cannot adjudicate a cause in first instance).

The problem of the absolute *material* incompetence of a lower tribunal (*ratione materiæ*) rarely arises before the Roman Rota, but it could arise if a tribunal was competent to adjudicate only certain types of causes (e.g., *CIC* c. 1423, §2; *DC* art. 9, §2). The Rota has at times declared its own absolute material incompetence, for example, when the object of the *libellus* is an allegedly illegitimate administrative act, which is reserved to the Supreme Tribunal of the Apostolic Signatura after the hierarchical-administrative path has been exhausted.[32]

The absolute incompetence of lower tribunals due to the persons involved (*ratione personarum*) does not occur very often, though a couple examples are worthy of mention. A tribunal can be absolutely incompetent in this way because of the *dignity* of the person, such as when a local tribunal declares its own competence and issues a sentence in a penal cause in which the accused is the supreme moderator of a religious institute of pontifical right (cf. c. 1405, §3, 2º).[33] It can also be absolutely incompetent due to the *ecclesial ascription* of a person, such as when the tribunal of a personal jurisdiction adjudicates a cause which neither involves one of its subjects nor pertains to a marriage (or contract) entered within its jurisdiction.[34]

By far the most commonly recurring type of absolute incompetence is *functional* incompetence (*ratione gradus iurisdictionis*). This is a fundamental element of the ecclesiastical judicial system.

> Since, in view of the public good, the hierarchy of tribunals, the succession of instances, and the partitioning of judicial activity to be exercised concerning the same cause have been established by the prescript of law, all are in agreement that competence by level of jurisdiction, or functional competence, which the whole system of the correct administration of justice in the Church implies, has absolute limits which no judge is permitted to fracture.[35]

[32] Cf., e.g., RRT, Decretum *c*. HUOT, 20 November 1984, no. 3, in *RRT Decr*., 2 (1984), p. 129; Decretum *c*. SERRANO RUIZ, 7 July 1995, in *RRT Decr*., 13 (1995), p. 81; Decretum Decani [POMPEDDA], 15 June 1998, in *QSR*, 11 (2001), p. 118. This same question has been handled by the Supreme Tribunal itself on the occasion of recourses to it against acts of the Rota; see Frans DANEELS, "La querela di nullità contro le sentenze della Rota Romana nella giurisprudenza della Segnatura Apostolica," in *La "querela nullitatis" nel processo canonico*, *op.cit*. (*vide supra* note 7), pp. 245-246 (= DANEELS, "La querela di nullità").

[33] Cf. RRT, B. 6/08, "Relazione sull'attività della Rota Romana nell'anno giudiziario 2008," no. III.4, in *QSR*, 19 (2009), p. 47 (= "Relazione 2008").

[34] Cf. RRT, Decretum *c*. POMPEDDA, 7 March 1986, in *RRT Decr*., 4 (1986), pp. 34-35.

[35] RRT, Decretum *c*. STANKIEWICZ, 24 July 1997, no. 12, in *RRT Decr*., 15 (1997), p. 156.

Absolute functional incompetence can arise in a variety of situations. The following emerge multiple times in Rotal jurisprudence: when a second first instance sentence is given in violation of the principle *ne bis in idem*; when there is disorder in the college of judges itself; when the documentary process is incorrectly used; when the *processus brevior* is erroneously used; when an illegitimate approach is taken in the appellate process; and when the Roman Rota has legitimately assumed jurisdiction over the cause. Let us consider these each separately.[36]

2.1.1 — *Ne bis in idem*

A basic rule of justice is that the same matter is not to be judged twice (*Ne bis in idem*). This is distinct from the principle of double jurisdiction—which protects the right of a party to appeal due to the fallibility of human judgements—since the appellate judge, as a rule, is not primarily issuing a second judgement on the same matter but is deciding whether the first judgement on the matter is to be confirmed or reformed. A sentence is null due to functional incompetence when, in effect, a *second first* sentence is issued in the same cause, involving the same parties, for the same reasons. This can only occur when the first sentence is legitimately declared null, for then it can be said that no sentence has been issued; thus the second sentence is the first valid sentence.

When a tribunal attempts to adjudicate a cause in first instance on the same ground already decided in the negative by another tribunal in first instance, the tribunal acts invalidly due to absolute incompetence (*DC* artt. 9, §2; 289, §2). For the matter has already been legitimately decided at the first level of jurisdiction. "It is certain … that a cause already handled and decided by sentence by one competent tribunal cannot be treated by another tribunal of the same level again as if in first instance between the same persons, concerning the same matter, and for the same *causa petendi*."[37]

[36] Another rather particular case concerns the authority competent to adjudicate the concession of a *restitutio in integrum*. In a cause of adoption from Lebanon, in which the *ius vigens* was canons 425-434 of the M.P. *Sollicitudinem Nostram*, a *restitutio in integrum* was granted by the third instance tribunal, while only the second instance tribunal (which issued the sentence) was competent to judge the requested *restitutio*. Cf. RRT, Sententia definitiva *c*. BOCCAFOLA, 21 March 1991, in *RRT Dec*., 83 (1991), pp. 184-191.

[37] RRT, Decretum *c*. DE LANVERSIN, 12 December 1990, no. 11, in *RRT Decr*., 8 (1990), p. 204. Cf. also SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Declaration, 3 June 1989, no. 7, in William L. DANIEL (ed.), *Ministerium iustitiæ. Jurisprudence of the Supreme Tribunal of the Apostolic Signatura. Official Latin Text with English Translation*, Gratianus Series, Montréal, Wilson & Lafleur Ltée, 2011, pp. 666-667 (= *Ministerium iustitiæ*).

In one cause, the sentence issued by a college of judges was declared null by the priest who was both judicial vicar and *Ponens*. This was invalid since, aside from when it is legitimately done by the appellate tribunal, the nullity of the sentence is declared by the judge who issued it (*CIC* c. 1624; *CCEO* c. 1305); this "judge" in the case was the college of judges. Then the same tribunal that issued the sentence proceeded to issue another sentence regarding the same cause, the same parties, and in the same instance. Since the sentence was never validly declared null, the original first instance sentence stood, and the tribunal was absolutely incompetent having judged the same cause twice (cf. *CIC* c. 1447).[38]

2.1.2 — *Defects in the College of Judges*

When the judicial vicar entrusts the adjudication of a cause to one or more judges (*CIC* c. 1425, §3; *CCEO* c. 1090, §1), the petitioner is immediately notified and the respondent is notified shortly after at the time of the citation. This establishes a public procedural relationship between the judge(s) and the parties, which is carefully and formally regulated in the external forum to ensure that justice is correctly administered. Any alteration of the college of judges or substitution of a sole clerical judge may only be done for a most serious cause (*gravissima causa*: *CIC* c. 1425, §5; *CCEO* c. 1090, §2), since this could induce suspicion as to the impartiality and objectivity of the tribunal. The decree constituting the judge or college of judges also allocates the competence of the tribunal in those particular designated judges. Thus, if the sentence is issued by judges not named in the decree of constitution of the tribunal or in a valid decree of substitution, the judges who issued the sentence are absolutely incompetent, and the sentence is null.[39]

The law also prescribes that when one has participated in a cause as an advocate, that same person cannot later validly decide the same cause as judge (*CIC* c. 1447; *CCEO* c. 1105; *DC* art. 66). However, since the nullity of the acts is an odious thing as described above, this is to be read strictly; and so one who merely gives counsel to the party without ever holding and exercising the function of advocate may be validly assigned to the college of judges.[40]

[38] Cf. RRT, Decretum *c.* FUNGHINI, 24 July 1996, in *RRT Decr.*, 14 (1996), pp. 159-165, esp. no. 5 at p. 164.

[39] Cf. RRT, Decretum *c.* BOCCAFOLA, 18 January 2007, B.Bis 3/07, no. 9, unpublished, p. 5; it is summarized in "Relazione sull'attività della Rota Romana nell'anno giudiziario 2007," no. III.7, in *QSR*, 18 (2008), p. 81 (= "Relazione 2007").

[40] Cf. RRT, Decretum *c.* HUBER, 31 May 2001, B.Bis 69/01, in FANELLI, *Relatio*-IV, pp. 95-96. Although not invalidating, this practice is to be avoided. It is necessary that the judge refrain

2.1.3 — *Misuse of the Documentary Process*

When a document subject to no exception establishes that a marriage is invalid due to the presence of a diriment impediment or the defect of canonical form, the competent judge may proceed to declare the marriage null without observing the norms of the ordinary contentious process, aside from the citation of the parties and the intervention of the defender of the bond (*CIC* c. 1686; *CCEO* c. 1372, §1; *DC* art. 295). The intention of the legislator in introducing this institute called the documentary process was to provide a way of expeditiously declaring a marriage null that is evidently invalid due to the existence of one these defects that are, as a rule, simply proven. The judge is absolutely incompetent to issue a sentence in favour of the bond by way of the documentary process, for he is limited by the law itself either to declare the nullity of marriage by way of that process or to admit the cause to an ordinary contentious process in first instance.[41]

2.1.4 — *Distortion of the processus brevior*

After a marriage is first declared null due to a defect of consent, the canonical legislator demands that the affirmative sentence be subject to the judgement of a higher tribunal. Indeed, after examining the affirmative sentence in light of all the acts of the cause, and weighing any appeals of the parties or the defender of the bond of the lower tribunal and the observations of the parties and the defender of the bond of the appellate tribunal made regarding the possibility of confirming the affirmative sentence, the superior judges are to decide whether to confirm the affirmative sentence—thus issuing a second affirmative decision *tamquam in secunda instantia*—or to admit the cause to an ordinary examination at the next level of jurisdiction (*CIC* c. 1682; *CCEO* c. 1368).[42] In doctrine and jurisprudence this is

from giving advice, by limiting himself to providing general information, ensuring a clear detachment from the private interests of parties or prospective parties (cf. *DC* art. 113, §§1-2).

[41] It is also a matter of a denial of the right of defence, since the petitioner is never given the opportunity to present evidence of the nullity of marriage within the prescribed procedure. "Hisce in casibus ideo numquam licet iudici decisionem negativam edere; si facit, sententia nullitate insanabili laborat, tum quia iudex processu documentali usus est extra limites legis, absolute statutos, tum quia, attenta natura summarii processus, utrique parti ius defensionis denegatum fuit (cf. can. 1620, n. 7)" (RRT, Decretum *c.* BRUNO, 27 January 1989, no. 5, in *RRT Decr.*, 7 [1989], p. 19).

[42] Can. 1682—§ 1. Sententia, quæ matrimonii nullitatem primum declaraverit, una cum appellationibus, si quæ sint, et ceteris iudicii actis, intra viginti dies a sententiæ publicatione ad tribunal appellationis ex officio transmittatur. § 2. Si sententia pro matrimonii nullitate prolata sit in primo iudicii gradu, tribunal appellationis, perpensis animadversionibus defensoris

commonly called the *processus brevior*, since it relaxes the appellate judge's obligation, once the defender of the bond appealed the affirmative sentence, to carry out a complete trial at the next level.

The careful observance of the norm of law governing the *processus brevior* is of great importance, lest the appellate judges act invalidly. With regard to the merits of the cause, the appellate judges have only two options: either to confirm the affirmative sentence immediately or to admit the cause to an ordinary contentious process. If they should attempt to issue a negative sentence immediately without first admitting the cause to an ordinary examination and carrying out the judicial process, the negative sentence is invalid due to the appellate tribunal's absolute functional incompetence.[43]

By no means is the *processus brevior* to be used when the first instance tribunal issued a negative sentence; for the purpose of this juridical institute is to expedite, if possible, the marriage nullity process, so that the matter can become a *res quasi-iudicata* once moral certitude about the nullity of marriage has been truly and justly reached. If an appellate tribunal were to issue a "decree of confirmation" of a negative sentence issued by the first instance tribunal—thus confirming a negative sentence without any judicial process—the second instance tribunal would do so invalidly in virtue of absolute functional incompetence.[44] For it would entail the appellate tribunal's *de facto* self-dispensation from the judicial process; and its competence in such a case is limited to the adjudication of the cause *ad tramitem iuris*.

vinculi et, si quæ sint, etiam partium, suo decreto vel decisionem continenter confirmet vel ad ordinarium examen novi gradus causam admittat.

[43] "Præceptum quidem can. 1682, §2 comprehenditur intra fines huius competentiæ *functionalis*, ideoque absolutæ. Etenim Legislator, eo ipso quod imposuit iudici alternativam decisionem *aut* decernendi confirmationem immediatam sententiæ affirmativæ primi gradus *aut* remissionem causæ ad ordinarium examen, eundem iudicem privavit potestate decernendi immediatam reformationem sententiæ. Aliis verbis, eum reddidit absolute incompetentem quoad reformationem istam." The appellate judges in the case erroneously attributed to themselves "competentiam functionalem qua evidenter carebant, nempe potestatem reformandi sine prævio decreto sententiam affirmativam primi gradus" (RRT, Decretum *c.* CIVILI, 5 May 1999, nn. 5 and 11, in *RRT Decr.*, 17 [1999], pp. 108, 109). See also Decretum *c.* AROKIARAJ, 28 May 2009, no. 4, prot. no. 20.251, B.Bis 73/09 and Decretum *c.* SCIACCA, 30 November 2007, no. 20, B.141/07, cited in Augustine MENDONÇA, "Irremediable Nullity of a Negative Sentence in Second Instance," in *SCL*, 5 (2009), pp. 502-505.

[44] Cf. RRT, Decretum *c.* CIVILI, 9 July 1997, no. 5, in *RRT Decr.*, 15 (1997), p. 134. The decree states that the second instance tribunal "expresse vetatur confirmare per merum decretum sententiam primæ instantiæ quæ non sit affirmativa." In so doing, however, it "certe excessit limites suæ functionis ac decisionem tulit erga quam incompetentia sua absoluta erat."

2.1.5 — *Errors in the Appellate Process*

The functional incompetence of a tribunal can occur when it attempts to handle its own appeal. In one cause, the tribunal attempted to issue a second sentence in the same case without first legitimately declaring the first sentence null, thereby issuing a *de facto* second instance sentence, which, as a first instance tribunal, it is absolutely incompetent to do. "A judge has no competence over a sentence which he has issued. […] Nowhere on earth can the same judge adjudicate the same cause at the same level of jurisdiction."[45]

Most frequently, the defect of absolute functional incompetence occurs during the appellate process when there is an erroneous application of canon 1683 (*CCEO* c. 1369). That norm establishes: "If a new ground of the nullity of marriage is brought forward at the level of appeal, the tribunal can admit it *tamquam in prima instantia* and make a judgement about it."[46] This constitutes an exception to the norm of law governing the formulation of the doubt in the appellate process. As a rule, the appellate tribunal is to decree that the appellate process and the definitive sentence is to address the question of whether the appealed sentence is to be confirmed or reformed (*CIC* c. 1639, §1; *CCEO* c. 1320, §1). In marriage nullity trials, since the cause pertains to the status of persons, the legislator allows an exception to this, so that the prosecution of the cause may be expedited without having to begin a new process at the first level of jurisdiction. This exception is based on the legitimate connection that exists between the first instance trial and the second instance trial, but it does not serve as a juridical basis for the second instance tribunal to conduct an entirely new, autonomous trial.

In one cause, after the second instance tribunal issued a decision on a new ground *tamquam in prima instantia*, a sentence was issued "as if in second instance" by another *turnus* of the same tribunal—which does not have third instance competence—whereas the adjudication of a doubt *tamquam in secunda instantia* is reserved to the third instance tribunal, which in the Latin Church is typically the Roman Rota.[47]

[45] RRT, Decretum *c*. GIANNECCHINI, 16 June 1984, nn. 5 and 9, in *RRT Decr*., 2 (1984) pp. 99, 100. Cf. also Decretum *c*. TURNATURI, 7 December 2000, B.Bis 111/00, no. 48, in FANELLI, *Relatio*-IV, p. 75.

[46] Can. 1683 — Si in gradu appellationis novum nullitatis matrimonii caput afferatur, tribunal potest, tamquam in prima instantia, illud admittere et de eo iudicare.

[47] Cf. RRT, Decretum *c*. BURKE, 21 June 1990, no. 11, in *RRT Decr*., 8 (1990), p. 120; SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Decree, 17 May 1995, in *Ministerium iustitiæ*, *op.cit*. (*vide supra* note 37), p. 713; *DC* art. 268, §2.

Unlike the Roman Rota, which as an apostolic tribunal can in some circumstances, for the sake of procedural economy, proceed to adjudicate the merits of a cause after declaring a sentence null, ordinary appellate tribunals may not do this when they declare the sentence of a lower tribunal null; they are obliged to remit the cause to the tribunal that issued the null sentence. This is evident from the very nature of the matter, since the basis for the appellate tribunal's competence is the valid definitive sentence and the legitimate transmission of the cause by the appeal of a party or *ex officio* in the case of the *processus brevior* (cf. *DC* art. 278). In one cause, however, the appellate tribunal declared the nullity of the first instance definitive sentence and proceeded to issue a new definitive sentence regarding the merits of the cause. It thought that it was doing this *tamquam in prima instantia*, but it was in fact in first instance *sic et simpliciter*, since there was no first instance sentence—due to the declaration of its nullity. Thus the Rotal *Turnus* declared this principle: "… a cause not yet judged and decided in first instance cannot be validly adjudicated at the level of appeal, since the incompetence of the superior judge is absolute at the lower instance of the trial, just as that of the lower judge is at the higher instance."[48]

In another cause, the first instance tribunal issued a negative decision, which was appealed to the second instance tribunal, which also issued a negative decision. The second instance tribunal (which was not also a first instance tribunal) declared its own decision null and proceeded to conduct a new process on a new ground—from the admission of the *libellus* to the publication of the "definitive sentence of the first level of jurisdiction"—as a first instance treatment of the cause having no connection with the true first instance decision. Its functional incompetence arose from the fact that it, a second instance tribunal, adjudicated a cause in first instance.[49] This decision enunciates some important principles that have been influential on this question in Rotal jurisprudence.

> [The] provision [of canon 1683] supposes a connection of causes according to the norm of canon 1414: "By reason of connection, causes that are connected to each other must be adjudicated by one and the same tribunal and in the same process, unless a prescript of law prevents it."
>
> Because of the norm of canon 1683, though, the appellate tribunal is endowed with competence to adjudicate the new ground *tamquam in prima instantia* not in an automatic way as an independent first instance tribunal, but rather because it already enjoys jurisdiction by reason of the legitimately

[48] See RRT, Decretum *c*. STANKIEWICZ, 24 July 1997, nn. 8, 13, 17, in *RRT Decr*., 15 (1997), pp. 155, 157, 159; quotation from no. 11 on p. 156.

[49] Cf. RRT, Decretum *c*. BOCCAFOLA, 21 April 1994, in *RRT Decr*., 12 (1994), pp. 59-63.

> appealed cause decided in first instance. Thanks to this already acquired jurisdiction, it is competent, by reason of the connection of causes, to adjudicate the new ground, or the "new cause" (since it is another reason for petitioning and level of jurisdiction; only the requested object is the same, and the parties in the cause remain the same).
>
> It therefore follows that, if the appellate tribunal treats each cause independently and separately, rather than "in one and the same process," it would act outside of its competence in relation to the first instance cause, since that cause in those circumstances falls under its jurisdiction by no valid title.
>
> Already enjoying jurisdiction for second instance, the appellate tribunal can also adjudicate another cause *tamquam*—namely, as if it were (even if in fact it is not)—*in prima instantia*; nevertheless, when a legitimate bond with the appealed cause is absent and the simultaneous treatment in one and the same cause is lacking, the appellate tribunal lacks competence for the first instance cause.
>
> However, the cause validly treated by the appellate tribunal *tamquam in prima instantia* is then appealed or sent *ex officio* to the superior tribunal, namely, of third instance, or the Roman Rota, as is the custom according to the proper and consolidated practice.[50]

The same principles were at play in a cause in which the second instance tribunal established the formula of the doubt just as in first instance but proceeded, privately and informally, to change the grounds and issue a sentence on only the new grounds, thus in effect carrying out an autonous trial.[51]

In another cause, the appellate tribunal, in effect, mixed an erroneous application of the *processus brevior* (as discussed above) with a second instance process in which a new ground of nullity was added *tamquam in prima instantia*. After the tribunal issued a decree "confirming" the first instance negative sentence, it admitted the cause to an ordinary examination, adding new grounds "as if in first instance" and issuing an affirmative sentence on one of the new grounds. Such a sentence was entirely invalid because, after it received the appeal of the petitioner, its competence was limited to the adjudication of the cause in second instance. Instead, it issued two decisions: the initial, illegitimate negative decision

[50] *Ibid*., no. 8, pp. 61-62.

[51] Cf. RRT, Decretum *c*. BOCCAFOLA, 5 December 1996, in *RRT Decr*., 14 (1996), pp. 240-246. The second instance judges "treated the matter as a new and independent cause in first instance, separate from the cause already treated [by the first instance tribunal]" (no. 13, p. 245).

(the "decree of confirmation" of the negative sentence) and a new affirmative sentence.[52]

Nevertheless, when the appellate tribunal is also a first instance tribunal, the illegitimate application of canon 1683 does not cause the nullity of the sentence, since it is not absolutely incompetent. For then it is a question rather of relative incompetence which, as discussed above, does not in itself cause the nullity of the sentence. In one cause, the appellate tribunal, deeming the grounds decided in first instance to be inappropriate, instituted two processes: one to decide the grounds decided in first instance, and another to decide grounds it deemed more suited to the facts. It issued two sentences: one negative and the other affirmative, in that order. In the process leading to the second decision, the tribunal acted as a first instance tribunal, conducting a process having no connection to the first instance trial. However, being also a first instance tribunal, its competence was acquired by the law itself, since its competence was only relative.[53]

2.1.6 — *Exclusive Jurisdiction of the Roman Rota*

When a first instance tribunal issues a definitive sentence, the same sentence must explicitly inform the parties of the methods by which and the tribunals before which it can be challenged (*CIC* c. 1614; *CCEO* c. 1297); included among these is the explicit mention of the right to appeal the sentence to the Tribunal of the Roman Rota already in second instance.[54] This

[52] "Tribunal … haud examinavit novum caput nullitatis utpote Tribunal iudicans in gradu appellationis (nam appellatio adversus sententiam primi gradus omnino decreto ratihabitationis concluditur), sed hoc fecit utpote Tribunal primi gradus tantum et dedit itaque sententiam nullam, equidem nullitate insanabili, quia ratione gradus, absolute incompetens erat (cann. 1440 et 1620, n. 1)" (RRT, Decretum *c.* JARAWAN, 26 July 1996, no. 4, in *RRT Decr.*, 14 [1996], pp. 181-182).

[53] Cf. RRT, Decretum *c.* BRUNO, 28 February 1997, nn. 7-9, in *RRT Decr.* 15 (1997), pp. 50-51. In another cause with a similar conclusion, the parties took initiative in the addition of grounds (Cf. Decretum *c.* BOCCAFOLA, 29 October 1998, in *RRT Decr.*, 16 [1998], pp. 318-322).

[54] Cf. *CIC* cc. 1444, §1, 1º; 1614; JOHN PAUL II, Allocutio ad Romanæ Rotæ Auditores, officiales et advocatos coram admissos, 26 January 1989, no. 7, in *AAS*, 81, (1989), p. 925: "Per garantire ancora di più il diritto alla difesa, è fatto l'obbligo al tribunale di indicare alle parti i modi secondo i quali la sentenza può essere impugnata (cf. can. 1614). Sembra opportuno ricordare che il tribunale di prima istanza, nell'adempimento di questo compito, deve anche indicare la possibilità di adire la Rota Romana già per la seconda istanza"; SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Decree, 24 August 1989, in *Ministerium iustitiæ*, *op.cit.* (*vide supra* note 37), p. 690; IDEM, Circular Letter to the Judicial Vicars of the Italian Regional Tribunals, 14 November 2002, in *ibid.*, p. 751, at 2º; *DC* art. 257, §2. In Rotal jurisprudence, see, e.g., RRT, Decretum *c.* DORAN, 18 May 1989, no. 13, in

obligation of the tribunal and the parties' right to appeal to the Rota are also in force when an affirmative sentence is issued in a cause of the nullity of marriage and the cause is to be transmitted to the superior tribunal *ex officio*; in such a case, when a party appeals to the Rota, the Rota itself assumes jurisdiction over the cause and decides whether to confirm the sentence or to admit the cause to an ordinary process.

The legitimate appeal of a party aggrieved by a sentence declaring the nullity of marriage is a juridical act capable of rendering the ordinary (or local) appellate tribunal absolutely functionally incompetent to issue a decree of confirmation in the *processus brevior* or otherwise to assume jurisdiction over the cause. Within the peremptory time limit of fifteen days (*CIC* c. 1630, §1; *CCEO* c. 1311, §1), the aggrieved party's appeal to the Roman Rota "suspends the exercise of jurisdiction" of the ordinary appellate tribunal (*CIC* c. 1417, §2; *CCEO* c. 1059, §2). Even if another party previously appealed the sentence to the ordinary appellate tribunal, and provided that the ordinary appellate tribunal does not first legitimately cite the party, the jurisdiction of the Rota supersedes that of the ordinary appellate tribunal (*CIC* c. 1632, §2; *DC* art. 283, §§2-4). Accordingly, if the latter tribunal should proceed to confirm the affirmative sentence, its decree would be irremediably null due to its absolute incompetence.[55]

In one cause that arrived at the Rota for a decision regarding whether or not to confirm the first instance affirmative sentence, the Rota admitted the cause to an ordinary process. Then, the first instance tribunal transmitted the cause to the ordinary appellate tribunal, which carried out a process and issued an affirmative sentence, though it was absolutely incompetent. The

RRT Decr., 7 (1989), p. 93; Decretum *c*. BURKE, 15 November 1990, no. 11, in *RRT Decr*., 8 (1990), p. 172; Decretum *c*. ERLEBACH, 7 May 1998, no. 11, in *RRT Decr*., 16 (1998), p. 134; Decretum *c*. PINTO, 22 June 2001, B.Bis 79/01, no. 6, in FANELLI, *Relatio*-IV, p. 97.

55 "Ideo, a momento de quo pars conventa legitimam appellationem coram Iudice a quo interposuit, Romana Rota competens fuit in causa …. Præterea, hæc competentia exclusiva fuit …. In fine, manifeste apparet ex provisionibus can. 1417, § 2, quod provocatio ad Sedem Apostolicam interposita in casu appellationis—sicut in Nostro—suspendit exercitium qualiscumque umbræ iurisdictionis quam Tribunal [appellationis] possedit" (RRT, Decretum *c*. BOCCAFOLA, 13 January 1988, in *RRT Decr*., 6 [1988], pp. 6-11, esp. at nn. 15-16). See also, e.g., Decretum *c*. RAGNI, 13 December 1990, no. 7, in *RRT Decr*., 8 (1990), p. 216 at b; Decretum *c*. DE LANVERSIN, 5 June 1996, nn. 14-17, in *RRT Decr*., 14 (1996), pp. 97-99; Sententia interlocutoria *c*. HUBER, 23 February 2000, no. 3, in *RRT Dec*., 92 (2000), p. 197; Decretum *c*. PINTO, 22 June 2001, B.Bis 79/01, no. 6, in FANELLI, *Relatio*-IV, p. 97; Decretum *c*. MONIER, 22 February 2002, B.Bis 14/02, no. 5, in *ibid*., p. 117; B. 67/06 and 50/06, "Relazione sull'attività della Rota Romana nell'anno giudiziario 2006," no. III.4, in *QSR*, 17 (2007), pp. 105 and 106 (= "Relazione 2006"); B. 105/06, "Relazione 2007," no. III.7, *cit*. (*vide supra* note 39), pp. 81-82.

position that the second sentence was valid in virtue of the principle *Ecclesia supplet* was rejected by the Rota since canon 144, §2 does not apply to acts of judicial power.[56]

In another cause, the first instance tribunal decided to send the cause to the ordinary appellate tribunal despite the fact that the respondent presented before it an appeal to the Rota. It erroneously justified this by saying that it never received the prosecution of the appeal and assumed the appeal was abandoned. This was incorrect, though, because the prosecution of the appeal is done before the tribunal *ad quem* (i.e., in this case the Rota), not the tribunal *a quo* (i.e., the first instance tribunal) (*CIC* c. 1633).[57] Conversely, when the appeal is made before the Rota before the decree of confirmation is issued, but the appeal is presented directly to the Rota and not to the Tribunal *a quo*—which is effectively the appellant's notification of the first instance tribunal of the eventual appeal to the Rota—the decree of confirmation is valid. The local tribunals in such a case act in good faith, since they are never legitimately informed of the appeal to the Rota.[58]

The defect of absolute incompetence can also occur when the primary question is the alleged nullity of the sentence. It has happened that, after the petitioner proposed a plaint of nullity together with an appeal to the Roman Rota by way of the local tribunal, the latter tribunal issued a decision about the nullity of the sentence. This decision was itself invalid due to the Rota's exclusive jurisdiction over the cause on account of the appellant's appeal.[59]

The principle of the connection of causes can also attribute exclusive jurisdiction to the Rota and thus render a lower tribunal absolutely incompetent. In one cause, the lower tribunal invalidly rendered a decision about alimony due to its absolute incompetence, since the cause of nullity of the marriage was pending before the Rota.[60]

[56] Cf. RRT, Decretum *c*. VERGINELLI, 14 February 2003, B.Bis 14/03, in FANELLI, *Relatio*-IV, p. 153. In this connection, SERRANO RUIZ notes the curiosity of the fact that the theory of common error has its origins in the judicial forum ("La querela di nullità contro la sentenza," *cit*. [*vide supra* note 2], p. 766).

[57] Cf. RRT, B. 31/06, "Relazione 2006," *cit*. (*vide supra* note 55), no. III.4, p. 104.

[58] Cf. RRT, Sententia interlocutoria *c*. PARISELLA, 12 January 1984, no. 17, in *ME*, 111 (1986), p. 295.

[59] For two examples of this, see RRT, Sententia interlocutoria *c*. LÓPEZ-ILLANA, 13 December 2000, no. 12, in *RRT Dec*., 92 (2000), p. 761; and Decretum *c*. SERRANO RUIZ, 24 May 2002, B.Bis 40/02, no. 2, in FANELLI, *Relatio*-IV, p. 126.

[60] Cf. RRT, B. 25/09, "Relazione sull'attività della Rota Romana nell'anno giudiziario 2009," no. III.4, in *QSR*, 10 (2010), p. 66 (= "Relazione 2009").

2.2 — Defect of the *potestas iudicandi*

Related to the question of the absolute incompetence of the judge is that of the defect of the *potestas iudicandi*. While absolute incompetence causes the irremediable nullity of the sentence due to the total defect of competence, this defect, in its classic expressions, entails the even more fundamental problem of a lack of judicial power. It evidently pertains to non-judges who attempt to issue a judicial decision, but as we will see it encompasses also situations in which non-members of the "tribunal" constituted for that cause issue the decision.

The issuance of a definitive sentence by a non-judge may be as overt as the defender of the bond attempting to issue a sentence.[61] At other times it may be more subtle. As is proper in the canonical system, after the full gestation of the judicial process, the college of judges convenes at the chancery of the tribunal on the day and at the time established by decree of the presiding judge. This judicial session is held in secrecy among the judges without the presence of any other officials.[62] The definitive sentence, which is a single act of the college of judges based on the majority vote of the college, is what emanates from this judicial session held in secret. Should others be admitted to that session, the authorship of the definitive act becomes obscured; for their presence induces doubt as to whether the decision is truly an act of the college of judges alone. Did the others who were present cast a vote and contribute to the majority? Did one or more of the judges yield to the persuasions of the others present without actually being convinced of the conclusion *ex actis et probatis*? In one cause, the defender of the bond and the chancellor of the tribunal joined the judges in rendering the decision, being present at the session of the judges and even signing the sentence; and this caused the irremediable nullity of the sentence due to a defect of the *potestas iudicandi* in the group that issued the sentence.[63]

[61] Cf. RRT, Sententia definitiva *c*. FILIPIAK, 15 February 1967, in *RRT Dec*., 59 (1967), pp. 106-110.

[62] Cf. *CIC* cc. 1455, §2; 1609, §§1-2; *CCEO* cc. 1113, §2; 1292, §§1-2; *DC* art. 248, §1.

[63] "Hac in causa, videtur quod, in sessione definitionis causæ, adsunt, etiam, Defensor vinculi et Cancellarius Tribunalis …. […] Sententia, dein, subsignata est ab omnibus præsentibus supradictis. Præsentia Defensoris vinculi Cancellariique, in sessione, est contra normam can. 1292, § 1 CCEO sancientis: 'cui nemo præter collegii iudices adesse potest'. Sententia, autem, est nulla hanc ob causam, iuxta can. 1303, § 1, n. 2 CCEO, quia decisionem dare est tantum iudicum ac minime personarum destitutarum potestate iudiciaria" (RRT, Decretum *c*. ALWAN, 26 November 1999, no. 13, in *RRT Decr*., 17 [1999], p. 337).

This defect also occurs when the proper college of judges does not issue the sentence. As we have explored elsewhere,[64] the word *tribunal* in the law has three meanings: the jurisdictional organ, the college of judges (or single clerical judge), and the offices of the tribunal chancery. Some orientations in jurisprudence suggest that the term *tribunal* in canon 1620, 2º (*CCEO*, c. 1303, §1, 2º) refers not only to the first but also to the second meaning.[65] In one cause, which was already alluded to above, the judges that issued the sentence were not the same ones as were named in the decree of the constitution of the college of judges. "For the principal argument in favour of the nullity of the sentence issued by the first instance tribunal … is drawn from the fact that the sentence was issued *by a collegial tribunal* which was not legitimately constituted." Initially, the cause was entrusted to a single clerical judge; then the judicial vicar entrusted it to a college of judges, A, B, and C; later, D was substituted in place of A; the sentence, however, was issued by only one of these judges, together with two new judges E and F. The decree then states: "And so it is evident to all that the sentence is irremediably null based on canon 1620, 1º and 2º …."[66]

Another way this defect can arise is when the respondent party is never cited—which evidently causes other defects, not the least of which is the denial of the right of defence. The citation is the incipient moment of the trial (*CIC* c. 1517) and it abounds with juridical effects, among which is that "the cause becomes proper to the otherwise competent judge or tribunal before which the action was initiated" (*CIC* c. 1512, 2º; *CCEO* c. 1194, 2º). If the citation never occurs, the cause never truly becomes proper to the tribunal, and thus the judge who thereafter issues a sentence lacks the power of judging in the case.[67]

The judge does not lack the *potestas iudicandi* when the recusal of a judge is legitimately rejected and the judge proceeds to render a decision or participate in the college's decision. For the simple objection against a judge

[64] Cf. William L. DANIEL, "The Dissenting Conclusion of the Judge," in *StC*, 44 (2010), pp. 197-200.

[65] In addition to the Rotal decision about to be described, the Apostolic Signatura has also indicated the irremediable nullity of the sentence due to a defect of the *potestas iudicandi* when the college is defective due to its composition by a cleric and two laypeople (Decretum, 9 May 1997, prot. no. 27874/97 VT, citing in MONTINI, "La querela di nullità," *cit.* [*vide supra* note 20], p. 616, note 26).

[66] RRT, Decretum *c.* BOCCAFOLA, 18 January 2007, B.Bis 3/07, no. 9, unpublished, p. 5; it is summarized in "Relazione 2007," no. III.7, *cit.* (*vide supra* note 39), p. 81.

[67] Cf. RRT, Decretum *c.* SABLE, 24 May 1999, nn. 6-7, in *RRT Decr.*, 17 (1999), pp. 147-148.

does not itself exclude him from the adjudication of the cause, but only the admission of the objection.[68]

2.3 — An Illegitimate Number of Judges

The remediable nullity of the sentence arises when an illegitimate number of judges issues a definitive sentence in a cause that is reserved to a college of three judges, namely, causes concerning the bond of sacred ordination, the nullity of marriage (with the exception of the documentary process or when the conference of bishops has permitted the use of a sole clerical judge), penal causes imposing certain more serious penalities and, for Eastern Churches, other causes determined by particular law (*CIC* c. 1425, §1; *CCEO* c. 1084, §1).

This can occur in a variety of scenarios. With regard to the legitimate exception for the Latin Church of employing a sole clerical judge in a case (c. 1425, §4), when this is permitted by the conference of bishops, a sole clerical judge may be entrusted with a cause when it is impossible in the case to designate a college of judges; when this impossibility is not established, the sole judge decides invalidly.[69] In one case, the defect of this impossibility was verified when the sentence was issued by a single judge, and yet the petitioner gave her judicial deposition before three judges, suggesting the availability of three judges to decide the case.[70] At the level of appeal, this defect occurs when the sentence was issued by a sole judge, which is never permitted.[71]

When the sentence is issued by more than three judges—for example, four—it is not remediably null. Indeed, this defect of nullity occurs when the number of judges deciding a cause is fewer than what is prescribed by law, not more.[72] It also does not occur when there are certain omissions in notifying the parties about the responsibilities of the individual judges. In

[68] Cf. RRT, Sententia definitiva *c*. HUBER, 23 February 2001, no. 22a, in *RRT Dec*., 93 (2001), p. 197.

[69] Cf., e.g., RRT, Decretum *c*. BURKE, 20 July 1988, no. 3, in *RRT Decr*., 6 (1988), p. 175; Decretum *c*. DORAN, 15 December 1988, no. 3, in *ibid*., pp. 236-237; Decretum *c*. CORSO, 3 May 1989, no. 4, in *RRT Decr*., 7 (1989), p. 81.

[70] Cf. RRT, Decretum *c*. BOCCAFOLA, 20 July 1988, no. 3, in *RRT Decr*., 6 (1988), p. 175.

[71] Cf. RRT, Decretum *c*. DORAN, 13 December 1989, no. 7, in *RRT Decr*., 7 (1989), p. 199; Decretum *c*. RAGNI, 13 December 1990, no. 7, in *RRT Decr*., 8 (1990), p. 216; Decretum *c*. BRUNO, 21 July 1995, no. 8, in *RRT Decr*., 13 (1995), p. 102. Cf. *DC* artt. 30, §4; 272, 1º.

[72] "Si numerus iudicum est minor, patet sententiæ nullitas. Si maior, quid iuris? Quæstio dubia esse videtur, ideoque propensiores foremus pro valore actus" (RRT, Decretum

one cause, a plaint of nullity was futilely proposed when the parties were not told which judge would act as judge-instructor or *Ponens*.[73]

3 — *Nullifying Defects in the Parties*

> Can. 1620 — A sentence suffers from the defect of irremediable nullity, if: […]
>
> 4º—the trial ... was not instituted against some respondent;
>
> 5º—it was issued between parties at least one of whom did not have personal standing in the trial;
>
> 6º—one acted in the name of another without a legitimate mandate; […].
>
> Can. 1622 — A sentence only suffers from the defect of remediable nullity, if: […]
>
> 6º—it was issued against a party who was legitimately absent according to canon 1593, §2.[74]

An essential presupposition of the judicial process and of the very office of the judge is the existence of contesting parties who intervene in said process and stand in need of the administration of justice. Principles such as *nemo iudex sine actore* and *Nemo iudex in propria causa* bear witness to this. In fact, when there is a substantial defect in one or both parties through the negligence or malice of the judge, his definitive sentence is irremediably null. These defects will be explored in this section.

The defect of the legitimately absent respondent, whose rights were otherwise observed in the process and which therefore causes the sentence to be only remediably null, will not be discussed here since no examples of it in jurisprudence were discovered by the author. The defect of a petitioner, stated in the law in terms of the lack of a judicial petition, will be discussed in the next section since, in jurisprudence, this is prevailingly conceived of as a defect in the object of a trial.

c. CIVILI, 5 May 1999, no. 7, in *RRT Decr*., 17 [1999], p. 108). See also B. 39/09, "Relazione 2009," no. III.4, *cit*. (*vide supra* note 60), pp. 63-64.

[73] Cf. RRT, Decretum *c*. HUOT, 21 May 1985, no. 15, in *RRT Decr*., 3 (1985), p. 117.

[74] Can. 1620 — Sententia vitio insanabilis nullitatis laborat, si: […] 4º iudicium … non institutum fuit adversus aliquam partem conventam; 5º lata est inter partes, quarum altera saltem non habeat personam standi in iudicio; 6º nomine alterius quis egit sine legitimo mandato; […]. Can. 1622 — Sententia vitio sanabilis nullitatis dumtaxat laborat, si: […] 6º lata est contra partem legitime absentem, iuxta can. 1593, § 2.

3.1 — The Defect of a Respondent

Every judicial process, or trial, by its nature demands a controversy of some kind and thus two opposing parties. This principle applies to causes of the nullity of marriage in a somewhat awkward way since the other party—that is, the other spouse—may or may not be opposed to the declaration of nullity of the marriage; nevertheless, the other spouse is a party (*pars*) who is summoned (*conventa*) to appear in trial. Thus this defect of nullity is incurred when the other spouse is altogether absent from the process in virtue of the judge's error.

Typically, the prevailing defect in a case of the absence of the respondent from the process is that of the denial of the respondent's right of defence; this is indeed the central concern of jurisprudence in such a situation, and so there are few instances in which this defect is invoked. It does seem to arise, though, in the context of the appellate process, though concomitantly with the denial of the right of defence. In one appellate process, the respondent was never cited; and since the citation is the summoning of the respondent to the trial, the instance never began and there truly was no respondent (c. 1517).[75] In the context of the *processus brevior*, a similar phenomenon occurs when the decree of confirmation is issued before the respondent even knows that the cause has passed to the second instance tribunal. As will be explored below, this is typically due to the non-publication of the first instance sentence and the failure of the appellate tribunal to invite the observations of the respondent. Thus, the appellate tribunal judges in a manner that is entirely hidden from the respondent through no fault of the party.[76]

3.2 — Defect of Personal Standing in the Trial

The expression *persona standi in iudicio* is inclusive of the notions of both *active legitimation*, or the juridical capacity to be a party to the trial based on juridical interest in the object of the trial, and *procedural capacity*, or the natural-psychological capacity to stand as a party in the trial. The

[75] Cf. RRT, Decretum *c*. SABLE, 24 May 1999, nn. 6-7, in *RRT Decr*., 17 (1999), pp. 147-148.

[76] "Quare decretum confirmationis, hisce in rerum adiunctis prolatum, nullitate insanabili laborat ob ius defensionis parti conventæ denegatum (can. 1620, n. 7), quin immo, quia iudicium appellationis de facto non institutum fuit adversus aliquam partem conventam (can. 1620, n. 4)" (RRT, Sententia definitiva *c*. STANKIEWICZ, 20 July 1995, no. 17, in *RRT Dec*., 87 [1995], p. 511).

defect of the latter is the more frequently occurring of the two in causes of the nullity of the sentence handled before the Roman Rota.[77]

Procedural incapacity is characterized thus: "Those who are mentally ill or feeble, by the very law of nature, do not enjoy active and passive procedural capacity; for in no way, or with much difficulty, can they provide for their rights in a trial as petitioners or respondents. Therefore, by a norm of the canonical legislation [i.e., canon 1620, 5°], if such persons stand in trial and place procedural acts in their own name, the judicial pronouncement issued by the judge is null by an irremediable defect."[78] Accordingly, those who lack the use of reason[79] or who are proven to suffer from a grave defect of discretion of judgement at the time of the trial[80] can only stand in trial by way of a legitimately designated curator. Violation of this norm causes the irremediable nullity of the sentence, since the party is thus considered to lack personal standing in the trial and to be wholly incapable of exercising his rights. As will be discussed below, however, the *ex officio* appointment of a curator when a party clearly enjoys procedural capacity can constitute a denial of his right of defence and for that reason cause the sentence to be null.

It would be formalistic for the judge simply to designate a curator and deem himself absolved of any further responsibility. When a curator is appointed *ex officio* for a mentally infirm party, but the curator is almost wholly inactive and the judge permits this, the judge has *de facto* made no provision for the party. The judge thus, in effect, unjustly tolerates the lack of personal standing in the trial due to the party's procedural incapacity. The judge, as the *curator curatoris*, is obliged to ensure that the curator takes an active role by truly exercising and defending the party's rights.[81]

[77] With regard to the former, one plaint of nullity was rejected by the Rota, which declared the active legitimation of the local religious superior governing a hospital (a work of the institute) for representing the juridical person of the hospital before an ecclesiastical tribunal (Cf. RRT, Decretum *c.* DAVINO, 18 February 1983, in *RRT Decr.*, 1 [1983], pp. 20-21).

[78] RRT, Decretum *c.* CIVILI, 3 July 1990, nn. 4 and 7, in *RRT Decr.*, 8 (1990), p. 134.

[79] Cf., e.g., RRT, Decretum *c.* PINTO, 19 December 1986, in *RRT Decr.*, 4 (1986), p. 183.

[80] Cf., e.g., RRT, Decretum *c.* CORSO, 16 January 1990, no. 8, in *RRT Decr.*, 8 (1990), p. 9.

[81] "Nam iudex qui existimat partem incapacem, esse standi in iudicio ideoque illi adsignat curatorem eo ipso se quasi auctorem facit alterius possibilis nullitatis; quia si curatorem non rite instituerit vel institutum sineret ut in substantialibus muneris defecerit, iterum redibit incapacitas partis, quæ non debito subsidio processuali instrueretur ad suam inhabilitatem sanandam. Quare daretur et hypothesis eiusdem can. 1620, n. 5, nempe de nullitate sententiæ in casu quo altera saltem pars non habeat personam standi in iudicio. Merito itaque diceretur iudicem esse curatorem curatoris, cum bono publico intersit et muneri iudiciali, ne sententia irrita pronuntietur" (RRT, Decretum *c.* SERRANO RUIZ, 22 March 1999, no. 6, in *RRT Decr.*, 17 [1999], p. 88).

This defect does not afflict the sentence when the party suffers only from *relative* procedural incapacity—that is, when he is incapable of only some acts or at only some stages of the trial due to the dynamic and evolving nature of the mental disturbance. Such a person may not need a curator in order to stand trial validly at a given stage or level of the trial.[82] The presence of a curator, on the other hand, does not in itself deprive the party of the right of defence. For the very purpose of the curator is to ensure the protection of the party's rights. Similarly, if there is prudent doubt about the alleged incapacity of the party, it is presumed that he enjoys procedural capacity.[83]

Moreover, the common jurisprudence of the Roman Rota insists that the existence of incapacity to consent to marriage (*CIC* c. 1095; *CCEO* c. 818) does not prove that the party is incapable of standing trial. "For not infrequently does Rotal jurisprudence state that the psychic capacity to contract marriage must be greater than the capacity to stand in trial." Thus, one who may have been incapable of consent may not be incapable of standing in trial.[84] In one cause, the petitioner, whose alleged incapacity due to a grave defect of discretion of judgement was in question (c. 1095, 2º), was not proven to lack procedural capacity, contrary to the allegations of the respondent's procurator-advocate. For the alleged incapacity was based on an anomaly that no longer gravely afflicted the party.[85]

3.3 — Defect of a Legitimate Mandate

A serious offence against a party's freedom and right to take an active role in the trial is committed when someone acts in his name without a legitimate mandate. A mandate is either a private juridical act placed in a written

[82] Cf. RRT, Decretum *c*. GIANNECCHINI, 26 June 1984, nn. 4-5, in *RRT Dec*., 76 (1984), pp. 404-405. On this distinction, see also STANKIEWICZ, "Chapter I. The Plaint of Nullity of the Judgement," in *op.cit*. (*vide supra* note 1), pp. 1547-1548.

[83] Cf. RRT, Decretum *c*. CORSO, 16 January 1990, no. 8, in *RRT Decr*., 8 (1990), p. 9.

[84] RRT, Decretum *c*. DORAN, 20 June 1989, no. 8, in *RRT Decr*., 7 (1989), p. 139. See also Decretum *c*. GIANNECCHINI, 26 June 1984, nn. 2, 4 and 5, in *RRT Dec*., 76 (1984), pp. 401, 404, 405; Decretum *c*. COLAGIOVANNI, 29 March 1990, no. 12, in *RRT Decr*., 8 (1990), pp. 78-79; Decretum *c*. CIVILI, 3 July 1990, nn. 8 and 13, in *ibid*., pp. 134, 135; Decretum *c*. FALTIN, 16 October 1991, no. 15, in *RRT Decr*., 9 (1991), p. 127; Decretum *c*. CIVILI, 2 March 1993, no. 2, in *RRT Decr*., 11 (1993), p. 39; Sententia definitiva *c*. PALESTRO, 19 May 1993, no. 8, in *RRT Dec*., 85 (1993), p. 385; Decretum *c*. SERRANO RUIZ, 22 March 1999, no. 7, in *RRT Decr*., 17 (1999), p. 88.

[85] Cf. RRT, Sententia *c*. CABERLETTI, 17 July 2003, A. 76/03, "Relazione sull'attività della Rota Romana nell'anno giudiziario 2004," no. III.10, in *QSR*, 15 (2005), p. 55; Maria Teresa ROMANO, "Rassegna ragionata della giurisprudenza di rito della Rota Romana," in *ibid*., p. 179.

form by a party and presented to the tribunal or, having the same force, a decree of the competent authority[86] legitimately designating another *ex officio* to stand in the place of the party as the latter's *alter ego*. Mandates of this kind are given to, and thereby establish another physical person as, a procurator or, for those lacking the use of reason or otherwise lacking procedural capacity, a curator or guardian (*tutor*).

Most commonly, this defect arises when a curator has been illegitimately designated by an ecclesiastical authority. Before constituting a curator, the competent authority must be morally certain, and demonstrate said certitude, that the party to whom a curator was given lacks the use of reason or is not of sound mind (*minus firma mente*).[87] Even more serious an offence is committed when the competent authority constitutes a curator for a party who clearly has procedural capacity; when, however, the party seems to lack procedural capacity, but prudent doubt remains, the judge validly constitutes a curator *ad cautelam*.[88]

As a general rule, it is important to avoid the kind of formalism that insists on something so odious as the irremediable nullity of the sentence when there is a clear will of the party to depend on another as his procurator. The Rota upheld the validity of the sentence in one case wherein the authenticity of the mandate itself was not established, but it was evident in the acts that the party was aware that he was being represented by the person that presented the mandate and did not oppose it.[89]

4 — *Nullifying Defects in the Object of the Trial*

> Can. 1620 — A sentence suffers from the defect of irremediable nullity, if: […]
>
> 4º—the trial took place without the judicial petition mentioned in canon 1501 ….; […].[90]

This defect draws out the juridical consequence of the violation of the principle *nemo iudex sine actore*: if the judge decides a matter that has not been

[86] Regarding this faculty given *a iure*, cf. RRT, Decretum *c*. SERRANO RUIZ, 15 March 1985, no. 11, in *RRT Decr*., 3 (1985), p. 89.

[87] Cf. RRT, Decretum *c*. CORSO, 28 February 1990, nn. 6-9, in *RRT Decr*., 8 (1990), pp. 50-51.

[88] Cf., e.g., RRT, Sententia definitiva *c*. PALESTRO, 19 May 1993, no. 9.A, in *RRT Dec*., 85 (1993), pp. 387-388.

[89] Cf. RRT, B. 119/05, "Relazione 2006," no. III.4, *cit.* (*vide supra* note 55), p. 105.

[90] Can. 1620 — Sententia vitio insanabilis nullitatis laborat, si: […] 4º iudicium factum est sine iudiciali petitione, de qua in can. 1501 .... […].

introduced by an introductory plea, the judge does not act. This clearly applies when there is literally no *libellus introductorius* initiating a process and requesting the ministry of the judge; the same principle applies when an appellate tribunal assumes the adjudication of a cause lacking a *"libellus" appellationis*.

There is also a less obvious, endo-procedural phenomenon that amounts to a defect of a judicial petition. Once a *libellus* is admitted, the judge immediately calls the parties to trial in order formally to establish the object of the trial. The object of the trial is proposed in the introductory petition, but it does not truly become the object of the trial until it is admitted by the judge in the decree of the formula of the doubt. This decree is inextricably linked to the judicial petition, since the judge cannot establish the direction of the trial without the introduction of a plea (*petitum* and *causa petendi*). As we will see, the Rota has most frequently declared the nullity of a sentence due to the defect of a judicial petition because of the *ex officio* modification of the formula of the doubt *inauditis et insciis partibus*.

4.1 — Defect of a *Libellus* or an Appeal

Evidently, if there is no *libellus* but a cause is introduced by the tribunal itself, the eventual sentence is null due to the defect of a judicial petition. This occurs, for instance, when a second cause concerning the same parties is initiated by the tribunal after the first cause was decided in the negative.[91]

The question of a defect of a judicial petition also arises when a *libellus* seems to lack a truly *judicial* petition, that is, one which lacks the *fumus boni iuris* and thus bears no connection to a matter subject to judicial examination. While the *ius postulandi* is a fundamental right of the faithful (*CIC* c. 221, §1; *CCEO* c. 24, §1), one who approaches a tribunal does have the obligation to present an at least implicit allegation supported by juridic facts (*CIC* c. 1504, 2º; *CCEO* c. 1187, 2º). In examining whether a sentence is irremediably null due to the defect of a judicial petition in the face of a rather vague *libellus*, the Rota seems inclined to favour the validity of the sentence in view of the *ius postulandi* and the principle of the conservation of acts.[92] It decided in one cause that the sentence was not null, since in the

[91] Cf. RRT, Sententia definitiva *c*. BOCCAFOLA, 21 April 1994, Sent. 28/94, no. 15, cited in Joaquín LLOBELL, "La nullità insanabile della sentenza per un vizio attinente alle parti (can. 1620, nn. 4, 5 e 6)," in *La "querela nullitatis" nel processo canonico*, *op.cit.* (*vide supra* note 7), p. 118, note 23 (= LLOBELL, "La nullità insanabile della sentenza").

[92] The matter is quite different, however, when the tribunal, after admitting a vague *libellus* lacking any concrete allegation, fails to establish any formula of the doubt. For in such a

libellus the petitioner made "at least a generic request … by which he invoked the services of the tribunal."[93] Another *Turnus* said that the defect of irremediable nullity could occur if the petition lacked a *petitum* and *causa petendi* and rather consisted merely of an explanation of the difficulties and breakdown of the common life of the spouses: "However, and in any event," it concludes, "since nullity is an odious thing and should be interpreted strictly, we are skipping this possible ground of nullity."[94]

As was alluded to above, some appellate tribunals have made an erroneous application of the *processus brevior* by considering their task to be one of deciding whether a *negative* sentence is to be confirmed or admitted to an ordinary examination. The complementary error is also made by some first instance tribunals which mistakenly think that all of their definitive sentences in marriage nullity trials—whether affirmative or negative—are to be transmitted *ex officio* to the appellate tribunal for the *processus brevior*. This is manifestly incorrect, however, based on a simple reading of canon 1682 (*CCEO* c. 1368). When a negative definitive sentence is issued by the first instance tribunal—or an affirmative or negative sentence in most other causes—the transmission of the cause to the appellate tribunal is dependent upon the appeal of a party. The appeal has the character of a *libellus* before the appellate tribunal. Without such an appeal, there is no judicial petition presented before the appellate tribunal requesting its judicial services, and its eventual definitive sentence is irremediably null.[95]

4.2 — The *ex officio* Modification of the Formula of the Doubt

The decree of the formula of the doubt is a moment of great significance in the judicial process. By determining the object of the trial, it juridically solidifies the judicial petition. It thus gives direction to the whole process: it determines the scope of the instruction, the basis for the discussion, and the object of the decision and of an eventual appeal. The formula of the doubt may establish precisely the grounds introduced by name in the *libellus*; but, in causes of the nullity of marriage, the judge is also free to formulate the doubt in a way that attributes the proper *nomen iuris* to the facts

case, the whole process is based on no true judicial petition—neither of the party, nor articulated for the party by the judge. Cf. RRT, Decretum *c*. FUNGHINI, 23 May 1989, in *RRT Decr*., 7 (1989), pp. 101-107.

93 RRT, Decretum *c*. PALESTRO, 17 February 1988, no. 2, in *RRT Decr*., 6 (1988), p. 40.

94 RRT, Decretum *c*. BOCCAFOLA, 26 October 1995, no. 10, in *RRT Decr*., 13 (1995), p. 126.

95 Cf. RRT, Decretum *c*. TURNATURI, 4 July 2002, B. Bis 59/02, cited in LLOBELL, "La nullità insanabile della sentenza," *cit*. (*vide supra* note 91), pp. 127-128, note 48.

presented by the party (*CIC* c. 1677, §2; *CCEO* c. 1363, §2; *DC* art. 116, §1, 2º), with[96] or without[97] the consent of the party.

Because of the influence of the formula of the doubt on the remainder of the process, its modification, in principle, constitutes a notable interruption in the flow of the process (*lite pendente, nihil innovetur*). Having verified the presence of a grave cause, the judge can validly decree such a change at the request of a party, after the other parties (private and public) have been heard (*CIC* c. 1514; *CCEO* c. 1196; *DC* art. 136).[98] Just as in the original formulation of the doubt, should the party request the addition of a specific ground on the basis of certain facts, the judge may *ex officio* add a ground different than the one requested, since he is rather attributing the proper *nomen iuris* to the alleged facts; the non-challenge of this within the course of the process entails the party's assent to the act of the judge.[99]

If the terms of the controversy are invalidly changed without the knowledge of the parties and the sentence addresses only the new ground(s), the sentence is null with respect to this ground since, in effect, the allegations were introduced not by a judicial petition (or a request of the party before the judge) but by the judge himself.[100] For example, in a cause decided in first instance on the ground of canon 1095, 3º, the appellate tribunal issued a sentence solely on the ground of canon 1095, 2º without the parties having any prior knowledge of a change of grounds.[101] The same consequence followed in another cause when the grounds, on the sole basis of which the marriage was declared invalid, were added at the recommendation of the defender of the bond and unbeknownst to the parties. Indeed,

[96] Cf. RRT, B. 28/09, "Relazione 2009," no. III.4, *cit*. (*vide supra* note 60), p. 64.

[97] Cf. RRT, Decretum *c*. SERRANO RUIZ, 15 March 1985, no. 12, in *RRT Decr*., 3 (1985), p. 89.

[98] Can. 1514 — Controversiæ termini semel statuti mutari valide nequeunt, nisi novo decreto, ex gravi causa, ad instantiam partis et auditis reliquis partibus earumque rationibus perpensis.

[99] Cf. RRT, B. 86/04, "Relazione 2007," III.7, *cit*. (*vide supra* note 39), p. 81.

[100] "Si ideo iudex in ipso momento decisionis, scilicet in sententia edenda, formulam dubii decidendam suo marte mutare ac statuere præsumit, sententia, super capite vel super capitibus mutatis data, nullius momenti habenda est; defecit enim in casu iudicialis petitio et iudicium adversus aliquam partem conventam numquam institutum est (cf. can. 1501 et can. 1620, n. 4)" (RRT, Decretum *c*. BRUNO, 21 July 1995, no. 7, in *RRT Decr*., 13 [1995], p. 102). Cf. also, e.g., Decretum *c*. STANKIEWICZ, 1 June 1993, no. 4, in *RRT Decr*., 11 (1993), p. 129; Decretum *c*. BRUNO, 25 November 1994, nn. 5-6, in *RRT Decr*., 12 (1994), pp. 188-189; Decretum *c*. SERRANO RUIZ, 15 May 1998, no. 3, in *RRT Dec*., 90 (1998), p. 377; Decretum *c*. BURKE, 4 June 1998, no. 6, in *RRT Decr*., 16 (1998), p. 183.

[101] Cf. RRT, Decretum *c*. JARAWAN, 9 February 1996, no. 5, in *RRT Decr*., 14 (1996), p. 26.

the parties were never notified about the change until the issuance of the sentence.[102]

Evidently, in these situations it is often concurrently verified that the sentence is irremediably null since the controversy, as validly established in the formula of the doubt, is not even partially decided, and since the parties' right of defence vis-à-vis the new ground(s) is denied (*CIC* c. 1620, 7º-8º; *CCEO* c. 1303, §1, 7º-8º). These problems will be discussed below in greater detail.

In one cause, "incapacity" was originally established as the ground at the beginning of the process, while the judge—*motu proprio* and unbeknownst to the parties—changed the ground to one of simulation and decided that in the sentence. It was well justified for the *Turnus* in the case to declare "the inexistence of a true canonical sentence, since the decision was brought forth from a little process (*processiculus*) completely different from that treatment of a matter in a judicial manner which is foreseen by the procedural norms of the Code of Canon Law."[103]

The norm of law may seem to suggest that the alteration of the terms of the controversy is initiated strictly by the party; but judicial experience suggests otherwise, since the determination of such terms is a technical question that may escape the parties. Can the judge take *any initiative* in the alteration of the formula of the doubt? In causes of the nullity of marriage—in which the formula of the doubt is established *ex officio* by the judge even in a manner that may diverge from the *libellus* and the responses to the citation, as discussed above—it seems that the judge may take some initiative.[104] Especially appropriate would be the judge's notification to the

[102] Cf. RRT, Decretum *c.* BOCCAFOLA, 5 December 1996, no. 13, in *RRT Decr.*, 14 (1996), p. 245.

[103] RRT, Decretum *c.* BOCCAFOLA, 16 June 1991, nn. 14-16, in *RRT Decr.*, 9 (1991), pp. 50-52, quotation taken from no. 14 on p. 50.

[104] Authors are divided on this question. One current of thought favours the power of the judge to alter the formula of the doubt *ex officio* in order to avoid a gravely unjust judgement, especially where the trial pertains to the salvation of souls (*CIC* c. 1452; *CCEO* c. 1110). The modification of the formula of the doubt is held to be not the introduction of a new petition but a reformulation of the *nomen iuris* attributed by the judge to the allegations of the parties. Cf., e.g., Juan José GARCÍA FAÍLDE, *Tratado de derecho procesal canónico*, 2nd ed., Salamanca, Publicaciones Universidad Pontificia de Salamanca, 2007, p. 172, no. 6; Joaquín LLOBELL, "L'introduzione della causa. Questioni sulla scelta della procedura giudiziaria nelle cause di nullità del matrimonio, sui titoli di competenza, sul libello introduttorio e sulla contestazione delle parti," in GRUPPO ITALIANO DOCENTI DI DIRITTO CANONICO (ed.), *I giudizi nella Chiesa. Il processo contenzioso e il processo matrimoniale*, Quaderni della Mendola 6, Milan, Glossa, 1998, pp. 75-76; Augustine MENDONÇA, "Canon 1514. Change or Addition of Grounds *Ex officio*," in *RR2005*, pp. 99-104; Mario F. POMPEDDA, "Decision-Sentence in Marriage Trials: of the Concept and Principles for Rendering an

advocate about a possibly more suitable ground, in order to foster the party's ability to take initiative or at least give the party the opportunity to decide whether to make a new allegation. If the initiative is wholly the judge's, though, the norm of law is surely violated, since the legislator requires the request of the party (*instantia partis*).[105] "The change of the doubt does not pertain to the judge."[106] In order to fulfil the norm of canon 1514, it would

Ecclesiastical Sentence," in *QSR*, 5 (1990), p. 84; Antoni STANKIEWICZ, "Title II. The Joinder of the Issue," in *Exegetical Comm*, vol. IV/2, p. 1159.

For the opposing view, cf., e.g., Manuel Jesus ARROBA CONDE, *Diritto processuale canonico*, 5th ed., Rome, Editiones Institutum Iuridicum Claretianum, 2006, pp. 377-379 (who notes that canon 1452 gives the judge the discretion to "proceed" but not to "initiate"); Paolo MONETA, "Determination of the Formulation of the Doubt and Conformity of the Sentence," in P.A DUGAN and L. NAVARRO (eds.), *Studies on the Instruction "Dignitas connubii*, Montréal, Wilson & Lafleur, Gratianus Series, 2006, pp. 96-97 (= MONETA, "Determination of the Formulation of the Doubt"); Klaus LÜDICKE and Ronny E. JENKINS, *"Dignitas connubii." Norms and Commentary*, Alexandria, VA, CLSA, 2006, p. 241, no. 4; Giovanni MARAGNOLI, "La formula del dubbio (artt. 135-137)," in P.A. BONNET and C. GULLO (eds.), *Il giudizio di nullità matrimoniale dopo l'Istruzione "Dignitas connubii," op.cit.* (*vide supra* note 20), pp. 126-130; MONTINI, *De iudicio contentioso ordinario*, *op.cit.* (*vide supra* note 19), pp. 81-84; PINTO, *I processi nel Codice di diritto canonico*, *op.cit.* (*vide supra* note 19), p. 254; Rafael RODRÍGUEZ-OCAÑA, "La introducción de la causa y la cesación de la instancia en la Instr. *Dignitas connubii*," in IDEM and J. SEDANO (eds.), *Procesos de nulidad matrimonial. La Instrucción "Dignitas connubii,"* Pamplona, EUNSA, 2006, pp. 191-192. This last named author prudently notes that the doctrinal position in favour of the faculty of the judge to alter the grounds *ex officio* was well articulated prior to the issuance of *DC*—and, I would note, including by those who were involved at least indirectly in its preparation—and evidently there was no provision for this in the norm applying canon 1514 to causes of the nullity of marriage. See *DC* art. 136.

[105] One Rotal decree, however, seems to deny the presupposition of the request of a party: "Indeed, from a comparison of canon 1513—concerning trials in general—with canon 1677—concerning the matrimonial process—it may be said that, even in view of the prescript of canon 1514, 'the request of the party' is not necessarily required to change the terms of the controversy (at least in what pertains to the precise ground of nullity), since the initiative of the judge *ex officio* made at any stage of the trial would be sufficient, when it truly goes unchallenged by the party for valid reasons" (RRT, Decretum *c.* SERRANO RUIZ, 24 October 1986, no. 5d, in *RRT Decr.*, 4 [1986], p. 146). Nevertheless, as we are about to see, this position appears to be in the minority among the Rotal judges.

[106] RRT, Decretum *c.* MONIER, 24 July 1996, no. 3, in *RRT Decr.*, 14 (1996), p. 171. This decree remitted the cause to an ordinary examination at the second level of jurisdiction; the violation of the norm of canon 1514 did not cause the nullity of the sentence since the parties were aware of the change prior to the issuance of the definitive sentence, but it was among several procedural irregularities that prohibited the confirmation of the sentence.

"The judge, therefore, can never change the terms of the controversy on his own initiative … the change of the alleged ground by the judge is wholly reproved by canon law …." (Decretum *c.* VERGINELLI, 6 December 2001, nn. 12 and 18, quoted in GULLO-GULLO, *Prassi processuale*, *op.cit.* [*vide supra* note 7], p. 274, note 24).

be necessary, after the judge's initiative, for there to be at least *the consent or acceptance* of the parties. "Who would doubt that the alteration of the *causa petendi*, lacking a request of a party and without the consent (*consensus*) of each of the parties, is a true harming of the right of defence, especially since the canon [1514] specifically indicates that such an alteration cannot validly be done without hearing the parties?"[107] "It without a doubt must also be asserted that the change of the *petitum* by the judge … or the introduction of a ground of nullity without at least the acceptance (*acceptatio*) or at least the notification (*notitia*) of the petitioner amounts to a judgement made without a judicial petition ...."[108]

It is important to distinguish, however, between the invalidity of the decree changing the grounds and the irremediable nullity of the sentence due to the defect of a judicial petition. The invalidity of the decree changing the grounds in itself causes only the remediable nullity of the sentence due to the sentence being based on a null act of the judge (*CIC* c. 1622, 5º; *CCEO* c. 1304, §1, 5º). It is defects in the manner, timing, and publicity of this decree which can lead to the irremediable nullity of the sentence. Rotal jurisprudence does not deal with this question directly, but in the context of treating the question of the nullity of the sentence, it regularly highlights minimum standards needed for the validity of the sentence when the norm of canon 1514 (*CCEO* c. 1196) is not precisely observed. It seems to demand minimally for the validity of the sentence that the parties be notified and heard and that they consent to the change.[109] This can be observed in the following passages, which typically consist of the bemoaning of the serious procedural violations of inferior judges.

With regard to the minimal need *to notify* the parties, we read: "A judgement was made without the judicial petition mentioned in canon 1501, and without the knowledge of the parties (*insciis partibus*), who were never formally informed (*numquam formaliter certiores factæ sunt*) about the addition of the new grounds …."[110] Another decree, in which the judges abruptly and radically changed the ground and then issued a decision on the new

[107] RRT, Decretum *c*. BOCCAFOLA, 16 April 1991, no. 13, in *RRT Decr*., 9 (1991), p. 50. Cf. also Decretum *c*. BOCCAFOLA, 5 December 1996, no. 11, in *RRT Decr*., 14 (1996), p. 243.

[108] RRT, Decretum *c*. JARAWAN, 9 February 1996, no. 5, in *RRT Decr*., 14 (1996), p. 26.

[109] The judge should proceed cautiously, however, since the *ex officio* modification of the formula of the doubt can cause the nullity of the sentence for the reasons described above. Cf. SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, prot. no. 31956/01 VT, cited in MONTINI, *De iudicio contentioso ordinario*, *op.cit*. (*vide supra* note 19), p. 84, note 164.

[110] RRT, Sententia interlocutoria *c*. BRUNO, 5 February 1992, no. 7, in *RRT Dec*., 84 (1992), p. 41.

ground, insists on the minimum of communicating (*communicare*) the change of grounds to the parties.[111] It is necessary for the parties *to be heard*, or at least to be given the opportunity to be heard. "For the parties always have the right to be heard (*ut audiantur*) about changing the *causa petendi*."[112] Another place describes canon 1514 as "concerning the required hearing (*auditio*) of all the interested parties about changing the terms of the controversy."[113] In one cause, the judge solely took the initiative in changing the grounds, but this did not cause the nullity of the sentence since instruction on the new ground was carried out subsequent to the change of grounds. Another important factor was that the new ground was intimately related to the original ground: partial simulation *contra bonum sacramenti* was changed to *error iuris circa indissolubilitatem* (c. 1099). Though this is a violation of canon 1514, the judicial petition was not lacking in the case.[114]

Other apparent violations of the norm governing the alteration of the formula of the doubt may in fact not be contrary to the law and thus non-invalidating. This is so when the original ground is in fact judged to be inclusive of the ground newly introduced by the judge.[115] It can also occur when, for example, the second instance formula of the doubt restricts the doubts in the case in order to make the object of the trial more precise; in one case, the first instance formula of the doubt consisted of canon 1095 without further specification, while the second instance formula of the doubt stated canon 1095, 3º.[116] Furthermore, it can happen—illegitimate though it is—that the second instance tribunal fails to formulate the doubt, thus depriving the

[111] Cf. RRT, Decretum *c*. BOCCAFOLA, 16 April 1991, no. 15, in *RRT Decr*., 9 (1991), p. 51. See also Decretum *c*. TURNATURI, 7 December 2000, B.Bis 111/00, no. 15, cited in LLOBELL, "La nullità insanabile della sentenza," *cit*. (*vide supra* note 91), p. 126, note 42.

[112] RRT, Decretum *c*. BURKE, 4 May 1988, no. 6, in *RRT Decr*., 6 (1988), p. 101, where he cites Antoni STANKIEWICZ, "De nullitate sententiæ 'ultra petita' prolatæ," in *Per*, 70 (1982), p. 233. Cf. likewise Decretum *c*. BURKE, 4 April 1998, no. 5, in *RRT Decr*., 16 (1998), p. 183.

[113] RRT, Decretum *c*. DORAN, 15 December 1988, no. 4, in *RRT Decr*., 6 (1988), p. 237.

[114] Cf. RRT Decretum *c*. BOCCAFOLA, 23 October 1997, no. 4, in *RRT Decr*., 15 (1997), p. 226. This decree admitted the cause to an ordinary examination before the Rota, and the formula of the doubt included only the new ground (Sententia definitiva *c*. BOCCAFOLA, 21 November 2002, no. 4, in *RRT Dec*., 94 [2002], p. 669).

[115] Cf. RRT, Decretum *c*. CORSO, 16 January 1990, no. 7, in *RRT Decr*., 8 (1990), p. 8.

[116] Cf. RRT, Decretum *c*. BOTTONE, 8 March 2000, B.Bis 28/00, in FANELLI, *Relatio*-IV, p. 48. When the formula of the doubt refers generally to a party's incapacity to consent according to the norm of canon 1095 and the decision pertains only to one or more aspects of canon 1095, the sentence is valid since the judicial petition pertaining to canon 1095 encompasses each of its parts (cf. Decretum *c*. BRUNO, 23 April 1993, no. 9, in *RRT Decr*., 11 [1993], pp. 68-69).

cause of a judicial petition within that instance of the trial. This, however, does not in itself cause irremediable nullity due to the absence of an object of the controversy, since the law presumes that the grounds are the same in second instance (cf. *CIC* cc. 1637, §4; 1639, §1), and hence the parties are already presumed to know the terms of the controversy.[117]

Finally, it can happen that, although the judge invalidly added grounds purely on his own initiative and unbeknownst to the parties, the sentence ultimately remains valid insofar as it also decides the grounds legitimately included in the formula of the doubt. In such a situation, the sentence is said to be afflicted with "partial nullity" due to the defect of a judicial petition; but it is partially (and therefore ultimately) valid with respect to the already agreed upon grounds.

> Therefore, if the judges of appeal, going beyond what is requested (*ultra petita*), pronounce a decision not only upon the grounds which were never agreed upon, not even as if in first instance, but also upon grounds already treated by the first instance tribunal, the sentence must be deemed valid with respect to these latter grounds agreed upon and decided, even if differently, in second instance. For, "What is useful must not be vitiated by what is useless" (*RJ* 37 in VI°). And, indeed, although the sentence is materially and formally one, nevertheless there are to be considered as many decisions, distinct and independent among themselves, as there are grounds treated. […] This seems to be demanded by justice and by the economy of the process.[118]

For, "lest the certitude of the law be endangered or a greater injury arise from a higher norm (*ex summo iure summa iniuria*), the Fathers of the *Turnus* maintain that this concerns not the nullity of the whole sentence but only partial nullity, that is, with respect to the grounds never alleged, agreed upon or discussed by anyone …."[119]

[117] Cf. RRT, Decretum *c*. BURKE, 30 April 1992, nn. 4-5, in *RRT Decr*., 10 (1992), p. 84. Elsewhere, we read: "… haud semel Nostrum Forum æstimavit sententiam primi gradus in quantum a partibus notam, 'locum tenere concordationis dubii', quia in eadem continentur et res petita et ratio petendi ideoque processus secundi gradus obiectum habet aut confirmandi aut infirmandi conclusiones primigeniæ sententiæ" (RRT, Decretum *c*. RAGNI, 19 October 1993, no. 11, in *RRT Decr*., 11 [1993], p. 167). It can happen, though, that the appellate process is so deficient (e.g., it consists solely of the observations of the defender of the bond and the definitive sentence) that there seems to be no object of the controversy even to decide, such that the sentence is irremediably null, *inter alia*, due to the defect of a formula of the doubt (cf. Decretum *c*. SABLE, 24 May 1999, nn. 6-7, in *RRT Decr*., 17 [1999], pp. 147-148).

[118] RRT, Sententia interlocutoria *c*. BRUNO, 5 February 1992, no. 5, in *RRT Dec*., 84 (1992), p. 40. The principle enunciated there, *congruis congruendis*, is *tot sententiæ quot capita*.

[119] RRT, Decretum *c*. FALTIN, 19 January 2000, B.Bis 7/00, no. 9, in FANELLI, *Relatio*-IV, pp. 44-45.

For example, one second instance tribunal decided on the ground of canon 1095, 2º on the part of both parties—which was neither a ground in first instance nor added in second instance as if in first instance—as well as canon 1095, 3º on the part of the man—which was included in the formula of the doubt in both instances. The Rotal *Turnus* declared that "the partial nullity of a juridical act is not to be extended to the parts of that act which are affected by no defects ...."[120]

5 — *Nullifying Defects in the Process Itself*

> Can. 1620 — A sentence suffers from the defect of irremediable nullity, if: […]
>
> 7º—the right of defence was denied one of the parties; […]
>
> Can. 1622 — A sentence only suffers from the defect of remediable nullity, if: […]
>
> 5º—it is based on a null judicial act, the nullity of which has not been sanated according to the norm of canon 1619; […].[121]

As is well known, the most frequently recurring cause of the nullity of the definitive sentence is the denial of the right of defence of a party, and the treatment of this question in the jurisprudence of the Roman Rota is rather abundant.[122] Another defect, causing the remediable nullity of the sentence, is a general norm establishing derived nullity as a motive for the declaring the nullity of the sentence. These will be dealt with each in turn.

[120] RRT, Decretum *c*. AROKIARAJ, 16 April 2008, B.Bis 47/08, in *StC*, 46 (2012), pp. 231-237, esp. nn. 6 and 8 at pp. 236 and 237. The same principle was applied to very similar facts in a Decretum *c*. ERLEBACH, 2 July 2009, B.Bis 94/09, in *ibid*., pp. 239-247; the principle is stated in these terms: "If the matter is considered under the aspect of the judicial sentence, the nullity of the decision concerning one ground does not ordinarily carry with it the nullity of the decision concerning other grounds" (no. 4, at pp. 246-247). See also Decretum *c*. CIVILI, 19 July 2000, B.Bis 75/00, nn. 4-5, in FANELLI, *Relatio*-IV, pp. 63-64; B. 122/07 and others, "Relazione 2008," no. III.4, *cit*. (*vide supra* note 33), p. 46.

[121] Can. 1620 — Sententia vitio insanabilis nullitatis laborat, si: […] 7º ius defensionis alteri utri parti denegatum fuit; […]. Can. 1622 — Sententia vitio sanabilis nullitatis dumtaxat laborat, si: […] 5º actu iudiciali nullo innititur, cuius nullitas non sit ad normam can. 1619 sanata; […].

[122] The reader is referred to the exemplary treatment of this topic by a great scholar of jurisprudence and Rotal judge: Grzegorz ERLEBACH, *La nullità della sentenza giudiziale "ob ius defensionis denegatum" nella giurisprudenza rotale*, Studi Giuridici 25, Vatican City, LEV, 1991.

5.1 — The Denial of the Right of Defence

As was noted in the Introduction, the legislator does not attempt exhaustively to elucidate the particular procedural situations that concretely cause the general defects of nullity established in the law. This is due not only to the human dynamism that is integral to every judicial process and to the importance of preserving the independence of the judge, but also because it would be a monumental, needlessly positivistic task to enumerate each possible problem leading to the nullity of the sentence, bearing the risk of omitting unforeseen situations. This is nowhere more true than with the defect that is caused by the denial of one of the parties' right of defence. In this section, after an exposition of general principles concerning the right of defence, we will explore the denial of the right of defence within the themes of the whole process in general, the manifold denial of the respondent's defence, the right to an advocate, and the designation and intervention of a curator, and then illustrate the elements of the right of defence in each stage of the process.

5.1.1 — *General Principles*

The denial of the right of defence causes the nullity of the sentence in virtue of both natural law, as was discussed above, and positive law. It flows from the natural law insofar as the very nature of the process entails a *contradictorium*, or a judicial exchange between the partes under the direction of the judge; and the denial of any opportunity to be engaged in it undermines the very nature of the process. It flows from positive law since not each and every positive procedural norm is of the natural law, and yet they are all, at least indirectly, oriented toward the protection or realization of the parties' self-defence. It is possible for procedural laws pertaining to the right of defence to be violated without resulting in a denial of the fundamental natural right of defence.[123] Said otherwise, the denial of the right of defence

[123] Cf. RRT, Decretum *c*. SERRANO RUIZ, 15 March 1985, no. 6, in *RRT Decr*., 3 (1985), p. 87; Decretum *c*. BOCCAFOLA, 25 July 1989, nn. 5-8, in *RRT Decr*., 7 (1989), pp. 142-143; Decretum *c*. DAVINO, 14 December 1989, no. 3, in *ibid*., p. 208; Decretum *c*. BOCCAFOLA, 25 January 1996, no. 5, in *RRT Decr*., 14 (1996), pp. 18-19; Decretum *c*. BURKE, 17 July 1997, no. 2, in *RRT Decr*., 15 (1997), p. 141; Decretum *c*. LÓPEZ-ILLANA, 18 February 1998, no. 5, in *RRT Decr*., 16 (1998), pp. 32-33 (citing classic doctrine); Decretum *c*. ERLEBACH, 7 May 1998, no. 5, in *ibid*., p. 131.
For an example in which the Rota reproved the many procedural irregularities of the lower tribunal but ultimately concluded that the right of defence was not denied, cf. Decretum *c*. DAVINO, 19 October 1989, in *RRT Decr*., 7 (1989), pp. 156-159.

may either amount to a "substantial defect" in the right of defence, or it may only be a matter of an incidental procedural defect. "By no means is any defect required for acknowledging that the right of defence has been wounded; but it is required that there be a substantial defect—for example, if every possibility of defending oneself was denied the parties such that the judicial exchange (*contradictorium*), or the very essence of the trial, is lacking."[124] In this connection, one can also distinguish between a total and a partial denial of the right of defence, to the extent that the violations of particular procedural rights undermine the very substance of the trial.[125]

The fundamental meaning of the right of defence consists of parties having the right to a judicial exchange (*contradictorium*),[126] which requires the realistic opportunity (*facultas*) for full awareness and involvement in the process, without prejudice to the legitimate use of a procurator, curator, or guardian. "Especially in our time, no one denies the natural right of defence; but beyond words and statements, this right is easily and often trampled upon, contrary to expectation. For often the right is freely recognized but, for many reasons, its exercise is in practice rendered impossible."[127] The nullity of the sentence due to a denial of the right of defence must be declared "not only if either party was absolutely denied the right to defend himself, but also if what was granted was entirely insufficient to defend himself."[128] It is classically defined as the "faculty granted to both parties to defend themselves against the assertions and allegations of the other party."[129]

It is critical to distinguish between the right itself and the exercise of the right; neglect, inertia or even the renunciation of the exercise of the right on the part of the party does not affect the validity of the sentence when the judge in fact gave the party the full opportunity to exercise the right of defence. "If the party did not in fact defend himself personally or through his advocate, the nullity of the sentence does not follow, provided that it is

[124] RRT, Sententia definitiva *c*. LEFEBVRE, 17 July 1976, B. 64/76, no. 20, cited in *RRT Decr*., 14 (1996), p. 113; Sententia interlocutoria *c*. STANKIEWICZ, 31 January 1989, no. 4, in *RRT Dec*., 81 (1989), p. 93.

[125] Cf. RRT, Decretum *c*. COLAGIOVANNI, 11 December 1990, no. 6, in *RRT Decr*., 8 (1990), p. 198.

[126] Cf. RRT, Decretum *c*. TURNATURI, 14 July 1995, no. 16, in *RRT Decr*., 13 (1995), pp. 85-86.

[127] RRT, Decretum *c*. GIANNECCHINI, 26 June 1984, no. 3, in *RRT Decr*., 2 (1984), p. 97.

[128] RRT, Sententia interlocutoria *c*. FUNGHINI, 29 November 1990, no. 9, in *RRT Dec*., 82 (1990), p. 829, with reference being made to a 3 July 1980 decision *c*. PARISELLA, no. 4, published in *RRT Dec*., 72 (1980), p. 463.

[129] RRT, Sententia definitiva *c*. WYNEN, 9 March 1955, no. 8, in *RRT Dec*., 47 (1955), p. 220.

established that the possibility of self-defence was given to the party."[130] In one cause, the man-respondent was given multiple opportunities to exercise the right of defence; but, due to his contentious character, he refused to act within the legitimate parameters established by the judge. He thus impeded his own exercise of the right of defence.[131]

In causes of the nullity of marriage, the possibility for exercising the right of defence is not a merely private right. For, since the trial concerns the parties' public status in the Church, their opportunity for self-defence is a matter of the public good. Its denial, in other words, would to some extent contribute to the harm of the public good that is marriage and the family.[132] For this reason, bearing in mind that the technical assistance of an advocate is not an essential aspect of the marriage nullity trial (cf. *CIC* c. 1481, §§1, 3; *CCEO* c. 1139, §§1, 3), it is incumbent upon the judge to notify spouses of the concrete ways in which they can defend themselves during the process:

> In addition, it is evident that the tribunal is bound by the obligation of informing both parties about their right of defence and of explaining to

[130] RRT, Sententia definitiva *c*. BEJAN, 24 October 1959, no. 5, in *RRT Dec*., 51 (1959), p. 469. Cf. also Decretum *c*. SERRANO RUIZ, 15 March 1985, *Nullitatis sententiæ*, no. 6, in *RRT Decr*., 3 (1985), p. 87; Decretum *c*. SERRANO RUIZ, 15 March 1985, *Nullitatis instructionis*, no. 3, in *ibid*., pp. 91-92; Decretum *c*. PALESTRO, 18 June 1986, no. 3, in *RRT Decr*., 4 (1986), p. 95; Decretum *c*. AGUSTONI, 7 November 1986, no. 4, in *ibid*., p. 171; Decretum *c*. FALTIN, 25 May 1987, no. 9d, in *RRT Decr*., 5 (1987), p. 82; Decretum *c*. DE LANVERSIN, 15 June 1988, no. 2, in *RRT Decr*., 6 (1988), p. 146; Decretum *c*. JARAWAN, 25 January 1989, no. 2, in *RRT Decr*., 7 (1989), p. 10; Decretum *c*. GIANNECCHINI, 23 May 1989, no. 2, in *ibid*., p. 95; Decretum *c*. BOCCAFOLA, 25 July 1989, nn. 7-8, in *ibid*., p. 143; Decretum *c*. BOCCAFOLA, 26 October 1989, nn. 11-14, in *ibid*., pp. 174-176; Decretum *c*. DORAN, 29 November 1990, no. 6, in *RRT Decr*., 8 (1990), pp. 188-189; Decretum *c*. GIANNECCHINI, 19 July 1991, no. 2, in *RRT Decr*., 9 (1991), p. 104; Decretum *c*. BRUNO, 21 July 1995, no. 7, in *RRT Decr*., 13 (1995), p. 101; Decretum *c*. TURNATURI, 13 June 1996, no. 13, in *RRT Decr*., 14 (1996), p. 113; Decretum *c*. PINTO, 22 October 1997, no. 4, in *RRT Decr*., 15 (1997), p. 205; Decretum *c*. ERLEBACH, 7 May 1998, no. 5, in *RRT Decr*., 16 (1998), p. 131; Decretum *c*. TURNATURI, 14 May 1998, no. 7, in *ibid*., p. 150; Sententia definitiva *c*. TURNATURI, 16 May 2002, no. 6, in *RRT Dec*., 94 (2002), p. 336; Decretum *c*. ALWAN, 23 January 2003, B.Bis 2/03, nn. 7 and 11, in FANELLI, *Relatio*-IV, pp. 150-151.

[131] Cf. RRT, Decretum *c*. RAGNI, 13 December 1990, no. 6, in *RRT Decr*., 8 (1990), pp. 214-215. At times the plaint of nullity may be presented when the party is aggrieved by the sentence but in fact exercised his rights; the proper remedy in such a situation is the appeal. One party that accused the sentence of nullity could not deny that she had been cited four times, received the sentence, and appealed the sentence (cf. RRT, Decretum *c*. POMPEDDA, 13 February 1995, no. 3, in *RRT Decr*., 13 [1995], pp. 31-32). In such situations the Rota rightly asks: *Quid amplius exigendum erat?* Cf. also, e.g., Decretum *c*. BRUNO, 31 May 1985, no. 4b, in *RRT Decr*., 3 (1985), pp. 147-148.

[132] Cf., e.g., RRT, Sententia definitiva *c*. HUOT, 12 March 1976, cited in *RRT Decr*., 7 (1989), p. 46.

> them what it entails in clear and practical terms. Since parties almost always possess little knowledge of canon law, not informing them about their rights is already the very same thing as partially denying their rights. A party can therefore renounce his right of defence; nevertheless, it is only permissible to say that he has done this if he was truly informed about the principal aspects of this right and the ways to exercise it.[133]

It is clear that not only does each private party enjoy the right of defence (that is, the petitioner and respondent; or in causes of the nullity of marriage, the spouses), but so also do the public parties where they intervene—that is, the defender of the bond and the promoter of justice. In causes of the nullity of marriage, the bond of marriage enjoys the right of defence. Thus, if the procedural rights of the defender of the bond are not respected, it can redound to the nullity of the sentence.[134] Similarly, the right of defence of the promoter of justice can occur when he is not called to a trial treating a matter in which he has interest—for example, the nullity of a sentence or other act of public power.[135]

In practical terms, the right of defence can be described generally as a twofold right: the right to information (*ius ad informationem*, a passive right) and the right to a hearing (*ius ad auditionem*, an active right). This has been eloquently explained by Bishop Antoni Stankiewicz.

> Moreover, the right of defence considered in itself has two elements, namely: a) the "right to information," which consists of the necessity of advising parties by way of notifications about facts, proofs, and decisions; and b) the "right to a hearing," which consists of the possibility to be

[133] RRT, Decretum *c*. BURKE, 22 May 1997, no. 7, in *RRT Decr*., 15 (1997), p. 88.

[134] Cf. RRT, Sententia definitiva *c*. ANNÉ, 28 June 1975, no. 1, cited in a Decretum *c*. STANKIEWICZ, 20 January 1983, no. 9, in *ME*, 109 (1984), p. 250: "... graviore adhuc laborat defectu substantiali sententia appellata cum revera desit ius defensionis, quod attinet ad ipsum vinculum matrimoniale." In one cause, the denial of the bond's right of defence was declared when the marriage was declared null on a ground never established in the formula of the doubt and without the intervention of the defender of the bond on that ground (cf. RRT, Decretum *c*. SERRANO RUIZ, 15 March 1985, no. 6, in *RRT Decr*., 3 [1985], p. 87). Cf. also Decretum *c*. SERRANO RUIZ, 15 May 1998, no. 3, in *RRT Dec*., 90 (1998), p. 377; Decretum *c*. PINTO, 23 October 1998, no. 3, in *RRT Decr*., 16 (1998), p. 316 ("Quid præterea dicendum de violatis iuribus vinculi Defensoris?").

[135] Cf. RRT, Decretum *c*. STANKIEWICZ, 29 November 1995, nn. 4-9, in *RRT Decr*., 13 (1995), pp. 153-156. When the decision vindicates the presumed validity of the challenged sentence, however, the absence of the promoter of justice does not cause the nullity of the decree, since the public good was not harmed (cf. Decretum *c*. DE ANGELIS, 24 May 2002, B.Bis 44/02, nn. 11-15, in FANELLI, *Relatio*-IV, p. 129). Also, in a cause of rights, the sentence is not invalid if the promoter of justice does not intervene and the matter is reasonably judged to pertain to the private not the public good (Decretum *c*. DE LANVERSIN, 27 October 1993, in *ME*, 121 [1996], pp. 364-369, esp. nn. 12-13).

> granted to parties both of stating and responding (*contradicendi*) to facts, proofs, and decisions and of bringing forward proofs and presenting defences ....
>
> These two elements are intimately joined to each other. The first, or the "right to information," has a passive character, since it does not require any activity of the parties aside from a disposition of the mind to receive notifications. The other, or the "right to a hearing," has an active character, since it requires the activity of the parties, which presupposes the receipt of notifications.
>
> Nevertheless, while the essence of the right "to information" is completed by its effective exercise, without which a defence can never otherwise be made in the trial, it pertains to the essence of the right "to a hearing" for there to be only the possibility of exercising such a right, but not its effective exercise.
>
> Thus, for example, the respondent can remit himself to the justice of the tribunal at the beginning of the process, or at a certain point renounce his own defence, not bring proofs forward, not challenge decisions, or be entirely idle in the trial. For the exercise of the right "to a hearing" depends entirely on the will of the parties.[136]

As is implicit in this simple yet masterful exposition of the right of defence, each phase of the process bears its own expression of the right of defence, as well as the judge's correlative obligation to communicate with the parties on account of their procedural relationship. Indeed, as is underscored often by the Roman Rota,[137] within the dynamic of the process itself—from the

[136] RRT, Decretum *c*. STANKIEWICZ, 27 May 1994, no. 10, in *RRT Decr*., 12 (1994), p. 120; Sententia definitiva *c*. STANKIEWICZ, 20 July 1995, no. 5, in *RRT Dec*., 87 (1995), p. 505; Decretum *c*. STANKIEWICZ, 29 March 1996, nn. 6-7, in *RRT Decr*., 14 (1996), p. 68. Cf. also Decretum *c*. BURKE, 7 May 1998, no. 4, in *RRT Decr*., 16 (1998), p. 126; Decretum *c*. ERLEBACH, 7 May 1998, no. 6, in *ibid*., p. 131; Decretum *c*. SABLE, 11 January 2001, B.Bis 1/01, no. 5, in FANELLI, *Relatio*-IV, pp. 83-84.

[137] Cf., e.g., RRT, Sententia definitiva *c*. ANNÉ, 13 February 1968, no. 2, in *RRT Dec*., 60 (1968), p. 90, cited in *RRT Decr*., 4 (1986), p. 179; Sententia interlocutoria *c*. STANKIEWICZ, 20 January 1983, no. 8, A. 7/83, cited in *RRT Decr*., 10 (1992), p. 4; Decretum *c*. DE LANVERSIN, 15 June 1988, no. 2, in *RRT Decr*., 6 (1988), p. 146. On some or all of these elements, see the following: Decretum *c*. MASALA, 27 March 1984, no. 5, in *RRT Decr*., 2 (1984), p. 46; Decretum *c*. GIANNECCHINI, 26 June 1984, no. 3, in *ibid*., p. 97; Decretum *c*. COLAGIOVANNI, 21 May 1985, nn. 6-9, 3 (1985), pp. 120-121; Sententia definitiva *c*. POMPEDDA, 23 July 1986, nn. 8 and 10, in *RRT Dec*., 78 (1986), p. 480; Decretum *c*. BRUNO, 31 October 1986, no. 7, in *RRT Decr*., 4 (1986), p. 166; Decretum *c*. DAVINO, 22 December 1987, no. 3, in *RRT Decr*., 5 (1987), p. 126; Decretum *c*. DE LANVERSIN, 15 June 1988, no. 2, in *RRT Decr*., 6 (1988), p. 146; Decretum *c*. GIANNECCHINI, 23 May 1989, no. 2, in *RRT Decr*., 7 (1989), p. 95; Decretum *c*. FUNGHINI, 24 May 1989, no. 7, in *ibid*., p. 104; Decretum *c*. DAVINO, 19 October 1989, no. 3, in *ibid*., p. 157; Decretum

citation to the issuance of the definitive sentence—the right to information and to a hearing takes different forms. 1) In the *introductory phase*, the parties have a right to know the specific (not generic) object of the cause (the *petitum* and the *causa petendi*) after first having been heard by the judge.[138] 2) In the *instructional phase*, the parties have the right to advance evidence and eventually to come to know all the evidence through a personal examination of it, as well as to present counter-evidence and responses to the evidence.[139] 3) In the *discussion phase* (*phase discussoria*) the parties have the right, personally and/or through their advocates, to propose arguments and respond to the arguments of others.[140] 4) In the *decisional phase* the parties have a right to receive a sentence that corresponds to the formulation of the doubt.[141] The concrete rights and their denial at each of these stages will be explored below in detail.

5.1.2 — *Complex, Grave Procedural Violations*

The right of defence proper to all of the parties may be denied when the judge perpetrates a complex and serious violation of procedural law, which he ought to observe meticulously for the legitimate exercise of his office. In the most extreme situations, his failure in this regard results in an essentially occult evolution of the process. In one cause, there was no formal *libellus* (only a statement of the parish priest reporting a conversation with the petitioner), no citation, no publicized formulation of the doubt, no opportunity to present evidence, no publication of the acts, no discussion, and no publication of the sentence—"as if the tribunal and its ministers were acting in the internal forum."[142] In another trial, a decree of publication and conclusion

c. DAVINO, 15 January 1990, no. 7, in *RRT Decr*., 8 (1990), pp. 3-4; Decretum *c*. CIVILI, 13 March 1991, no. 6, in *RRT Decr*., 9 (1991), p. 37; Sententia definitiva *c*. STANKIEWICZ, 20 July 1995, no. 7, in *RRT Dec*., 87 (1995), pp. 505-506; Decretum *c*. STANKIEWICZ, 29 November 1995, no. 12, in *RRT Decr*., 13 (1995), p. 157; Decretum *c*. DE LANVERSIN, 5 June 1996, no. 19, in *RRT Decr*., 14 (1996), p. 99; Decretum *c*. TURNATURI, 13 June 1996, no. 14, in *ibid*., p. 114; Decretum *c*. LÓPEZ-ILLANA, 18 February 1998, no. 6, in *RRT Decr*., 16 (1998), p. 33.

138 Cf. *CIC* cc. 1507, §1; 1513, §§1, 3; *CCEO* cc. 1190, §1; 1195, §§1, 3; *DC* artt. 126, §1; 127, §§1-2; 135.

139 Cf. *CIC* cc. 1527, §1; 1598, §1; *CCEO* cc. 1208, §1; 1281, §1; *DC* artt. 157, §1; 229, §2.

140 Cf. *CIC* cc. 1601, 1603; *CCEO* cc. 1284, 1286; *DC* artt. 240, §1; 242-243.

141 Cf. *CIC* cc. 1611, 1614-15; *CCEO* cc. 1294, 1297-1298; *DC* artt. 250, 257-258.

142 RRT, Decretum *c*. SERRANO RUIZ, 1 July 1988, in *RRT Decr*., 6 (1988), pp. 156-164, esp. no. 8 at p. 161. In a similar vein, cf. Decretum *c*. JARAWAN, 9 February 1996, no. 4, in *RRT Decr*., 14 (1996), pp. 25-26; Decretum *c*. ALWAN, 26 November 1999, no. 11, in *RRT Decr*., 17 (1999), p. 337.

were perplexingly issued seven days after the sentence was issued—and therefore not at all—thus consigning the whole instruction and critical debate about its weight to the private sphere.[143]

5.1.3 — *The Manifold Denial of the Respondent's Right of Defence*

It is the rights of the respondent that tend to be most susceptible to denial given the fact that he is the summoned party (*pars conventa*). Another factor in causes of marriage nullity that may contribute to this is a divorce-oriented mentality that can most regrettably prevail in certain tribunals. The Rota is appropriately sensitive to this dimension of the process. "Accordingly, the right of defence accords the parties the opportunity to bring proofs forward and to read or come to know the acts; this is all the more urgent when the respondent is opposed to the petition of the petitioner."[144] When the judge denies the right of defence of the respondent opposed to the declaration of nullity of the marriage, and the defender of the bond violates his function by acting in favour of nullity, "the judge together with the defender of the bond make, as it were, a conspiracy against the matrimonial bond."[145]

Not infrequently, the irremediable nullity of the sentence due to the denial of the right of defence occurs on account of not merely one procedural violation but manifold, serious, substantial defects in the process. This invariably occurs because "a party lacks the possibility" for exercising the right of defence because "the judge had impeded or denied the party's defence."[146]

At times this involves a consistent denial of the respondent's right of defence,[147] which may in fact be but a symptom of an otherwise radically disordered process, such as is observed here:

> The *libellus* was presented without any ground of nullity; the alleged ground of nullity was not communicated to the woman [respondent], since

[143] Cf. RRT, Decretum *c*. BURKE, 28 May 1998, nn. 12-14, in *RRT Decr*., 16 (1998), p. 177.

[144] RRT, Sententia interlocutoria *c*. POMPEDDA, 23 July 1986, no. 11, in *RRT Dec*., 78 (1986), p. 481.

[145] RRT, Decretum *c*. STANKIEWICZ, 20 January 1983, no. 9, in *ME*, 109 (1984), p. 250.

[146] RRT, Sententia definitiva *c*. BEJAN, 24 October 1959, no. 5, in *RRT Dec*., 51 (1959), p. 468, cited in *RRT Decr*., 13 (1995), p. 85. Cf. also Decretum *c*. AGUSTONI, 15 November 1983, no. 6, in *RRT Decr*., 1 (1983), p. 111; Decretum *c*. FUNGHINI, 24 May 1989, no. 7, in *RRT Decr*., 7 (1989), p. 104; Decretum *c*. BOCCAFOLA, 26 October 1995, no. 6, in *RRT Decr*., 13 (1995), p. 123.

[147] Cf. RRT, Decretum *c*. STANKIEWICZ, 20 January 1983, nn. 13-17, in *ME*, 109 (1984), pp. 252-256; Sententia interlocutoria *c*. POMPEDDA, 27 February 1984, no. 8, in *RRT Dec*., 76 (1984), pp. 123-124; Decretum *c*. COLAGIOVANNI, 21 May 1985, nn. 10-11, in *RRT*

there in fact was not one; the decree establishing the doubt to be resolved, issued shortly before the first instance sentence was issued, was not communicated to the woman; the woman only knew in some way the grounds of nullity in the interrogatory of second instance; the opportunity to read the acts and decisions was denied the same respondent.

Furthermore, the person assigned as the respondent's procurator-advocate was the defender of the bond, who for his part acted in favour of the nullity of the marriage.[148]

The respondent's right of defence might also be denied when the party is illegitimately considered absent from the process, such as is seen in the following two examples. In the first, while the respondent had the opportunity to be heard before her judicial vicar consented to the adjudication of the cause by the petitioner's local tribunal (c. 1673, 3º-4º), at which time she assented to this and stated her intention not to be involved in the process, the first and second instance tribunal did not communicate any citations or other acts to her.[149] In the second, concerning a trial taking place in Canada, the respondent, who resided in Lebanon, was declared absent since the tribunal never received her response to the citation, and none of her rights were respected. After the sentence was issued, though, it was discovered

Decr., 3 (1985), pp. 121-122; Decretum *c*. DORAN, 19 May 1988, no. 12, in *RRT Decr*., 6 (1988), pp. 128-129; Decretum *c*. SERRANO RUIZ, 14 December 1988, in *ibid*., pp. 231-234, esp. nn. 1 and 4; Decretum *c*. CORSO, 16 January 1990, no. 10, in *RRT Decr*., 8 (1990), p. 10; Decretum *c*. STANKIEWICZ, 26 October 1990, nn. 17-18, in *ibid*., p. 163; Decretum *c*. BURKE, 14 March 1991, no. 3a, in *RRT Decr*., 9 (1991), pp. 39-40; Decretum *c*. BURKE, 11 June 1992, no. 17, in *RRT Decr*., 10 (1992), p. 117; Decretum *c*. FALTIN, 18 May 1994, nn. 6-8, in *RRT Decr*., 12 (1994), pp. 103-105; Decretum *c*. BURKE, 20 July 1995, in *RRT Decr*., 13 (1995), pp. 96-98; Decretum *c*. STANKIEWICZ, 29 March 1996, nn. 9-14, in *RRT Decr*., 14 (1996), pp. 69-72; Decretum *c*. BURKE, 7 May 1998, nn. 5-6, in *RRT Decr*., 16 (1998), pp. 126-127; Decretum *c*. ERLEBACH, 7 May 1998, nn. 7-10, in *ibid*., pp. 131-133; Decretum *c*. BOCCAFOLA, 14 July 1998, nn. 2-3, 9-10, in *ibid*., pp. 262-263, 266-267.
In a penal cause against a cleric, it was not proven that the notification of the *libellus* was made to the accused; additional allegations were made and added several months after the formulation of the doubt without his knowledge; he was declared absent for not appearing at the tribunal, even though this was physically impossible; he was given no advocate; and he had no real opportunity to come to know and respond to the arguments of the promoter of justice (cf. Decretum *c*. FALTIN, 10 November 1987, in *RRT Dec*., 79 (1987), pp. 774-784, esp. nn. 21-23, at pp. 779-781).

148 RRT, Sententia interlocutoria *c*. POMPEDDA, 23 July 1986, nn. 6 and 14, in *RRT Dec*., 78 (1986), pp. 480, 481. In another decree there were listed many, very serious procedural violations; and in the conclusion it suggested that more and more could be listed: "prætermissis, de cetero, aliis gravissimis factis, quæ ad rem adduci possent" (Decretum *c*. DAVINO, 28 May 1993, nn. 10 and 14, in *RRT Decr*., 11 [1993], p. 123).

149 Cf. RRT, Decretum *c*. ERLEBACH, 13 July 2001, B.Bis 91/01, in FANELLI, *Relatio*-IV, p. 99.

that she in good faith sent her response to the citation to the bishop while the see was vacant, including an indication of her willingness to submit to a deposition.[150]

Sometimes the respondent's right of defence is substantially denied for the very practical reason of the tribunal using the wrong address. One tribunal was negligent in sending to the old address of the respondent, who informed the tribunal of the change, the following acts: the decree of publication, the decree of the conclusion in the cause, and the sentence. The party's complaints about these problems before the appellate tribunal were ignored, and the appellate tribunal itself sent its invitations for observations and the decree of confirmation to the wrong address as well. Accordingly, both the first instance sentence and the decree of confirmation were declared irremediably null.[151]

Another practical problem that can lead to a denial of the right of defence is the tribunal's failure to appreciate the obstacles of language and distance that can hinder the exercise of this right by the respondent. In a cause originating in the U.S.A. in which the respondent lived in Poland, there were multiple irregularities: the American tribunal erroneously deemed itself the tribunal of the majority of the proofs; the respondent was given only three weeks to give a written response from a communist territory; the letters were written only in English to a respondent who did not understand English; the local Polish tribunal was not asked to assist with the instruction or the communication of the tribunal's acts; she was given only two weeks to examine the acts and present other evidence; the text of the sentence was not sent to the respondent; the second instance judge never verified that the citation had truly reached the respondent (cf. c. 1592); and the decree of confirmation was issued before she had a chance to challenge the affirmative sentence (which she wished to do) and indeed before the time limit for appealing had extinguished. This was a matter of an invalid decree of confirmation, but not an invalid first instance sentence since, despite all of the defects mentioned above, it was proven that the respondent was negligent in making responses during the course of the process, sending four responses only after receiving notice of the first instance sentence.[152]

[150] Cf. RRT, Decretum *c*. BURKE, 30 January 1997, in *RRT Decr*., 15 (1997), pp. 18-20.

[151] Cf. RRT, Decretum *c*. BRUNO, 15 July 1993, nn. 8-10, in *RRT Decr*., 11 (1993), pp. 140-143. For another case entailing the same error with similar juridical consequences, cf. Decretum *c*. STANKIEWICZ, 27 May 1994, nn. 19-26, in *RRT Decr*., 12 (1994), pp. 124-127.

[152] Cf. RRT, Sententia definitiva *c*. STANKIEWICZ, 20 July 1995, nn. 1-20, in *RRT Dec*., 87 (1995), pp. 502-512.

5.1.4 — *The Right to an Advocate*

Those who initiate a trial or are summoned before the ecclesiastical judge have the right to appoint a duly approved advocate to represent them and their interests before the tribunal. Outside of penal causes, in which the accused must have an advocate, parties may elect not to appoint a procurator or advocate but may simply act and respond themselves. In some situations, the judge, according to his discretion, may determine that a party needs an advocate and thus appoint one *ex officio* until the party has given a mandate to another (*CIC* c. 1481; *CCEO* c. 1139; *DC* art. 101). In reality, many disputes arise regarding the presence or absence of a procurator or advocate or their proper functioning in a case, and these elements may or may not entail a denial of the right of defence.

The denial of the right of defence occurs when the judge impedes or denies a party the right to an advocate. This may occur either when the party has requested an advocate and is not given the list (*album*) of qualified advocates or offered an advocate, or when the party requested gratuitous juridical representation (*gratuitum patrocinium*) and no response is made to the request.[153] In one cause, the request for gratuitous juridical representation was delayed until after the conclusion and discussion of the cause, and it was not granted, despite the party's proven low economic condition.[154] Nevertheless, in certain causes, the judge's neglect in offering an advocate after one has been requested may not cause the nullity of the sentence when the party shows himself to have been too passive in the matter. In one cause, the respondent

> complained that an advocate was not appointed for her by the tribunal, even though she declared to the inquiring judicial vicar that she wanted to have the assistance of one. This defect, though, pertains to the denial of the right of defence only formally, not substantially. For the woman-respondent could have been more diligent and appointed a procurator-advocate for herself.[155]

Even if an advocate is given, the party's rights may be denied if the tribunal proceeds to omit opportunities for the party to exercise the right of defence personally or directly; for one does not renounce the personal exercise of rights by appointing an advocate, and it would be seriously unjust for the tribunal to

[153] Cf. RRT, Sententia definitiva *c.* DE JORIO, 23 November 1966, no. 7, in *RRT Dec.*, 58 (1966), p. 843; Decretum *c.* COLAGIOVANNI, 29 March 1990, no. 8, in *RRT Decr.*, 8 (1990), p. 77.

[154] Cf. RRT, Decretum *c.* FUNGHINI, 20 May 1992, no. 11, in *RRT Decr.*, 10 (1992), p. 101.

[155] RRT, Sententia interlocutoria *c.* POMPEDDA, 27 February 1984, no. 8, in *RRT Dec.*, 76 (1984), p. 123.

appoint an advocate in order to deny a party's right to defend himself personally.[156] On the other hand, the party's rights are denied when his advocate's rights are denied, since the latter exist to support and actualize the former. The judge's denial of these rights thus impede the defence of the party.[157]

The denial of the right to an advocate can occur when the integrity and purity of the role of advocate is lost due to the judge's lack of vigilance over its exercise. In one cause, the one who was named the respondent's advocate was, unbeknownst to the respondent, named later as the petitioner's advocate. This person in fact acted on behalf of the petitioner as well as in the role of defender of the bond. The newly appointed advocate for the respondent (the successor to the first person) never acted on behalf of the respondent, nor was this person's name ever communicated to the respondent. This amounted to a practical denial of the right to an advocate.[158]

Nevertheless, the absence of an advocate does not in itself amount to a denial of the right of defence: "It is a settled question in doctrine and jurisprudence, at least more recently, that the absence of an advocate in a cause of the nullity of marriage of itself does not induce the nullity of the sentence."[159] For the presence of an advocate, or the enjoyment of the "technical protection" of one's rights is not an essential element of the right of defence.[160] "The appointment of a procurator-advocate is not in itself necessary 'if it is established that the party in the cause could and was able to exercise the right of defence, and how much more true is this when the defence of the parties very much occurred in what was brought forward, indeed in what they brought forward, which the facts themselves illustrate'."[161] Evidently, the party's right is not denied when he explicitly

[156] "Item pariter certum est, si præ oculis habeatur memoriale exhibitum a Conventa necnon ipsius panditam intentionem idipsum complendi, mulierem conventam voluisse sese defendere per se ipsam, idest directe: quod ius certissime Tribunal afferre illi non debuit neque potuit, eligendo pro parte quondam patronum" (RRT, Decretum *c.* POMPEDDA, 19 October 1992, no. 6, in *RRT Decr.*, 10 [1992], p. 183).

[157] "… quando [Advocatus] iura pro Conventa postulavit, quorum recognitio laborem Iudicum notabiliter auxerit, vel celeritatem processus diminuerit, vel quorum existentiæ Iudices ipsi inconscii fuerint, legitimas eius instantias Iudices præteriverunt vel tam præpediverunt adeo ut substantia veræ defensionis … in praxi negata fuerit" (RRT, Decretum *c.* BOCCAFOLA, 13 February 1988, no. 12, in *RRT Decr.*, 6 [1988], p. 37).

[158] Cf. RRT, Decretum *c.* ALWAN, 15 February 2000, B.Bis 16/00, no. 7b, in FANELLI, *Relatio*-IV, p. 46.

[159] RRT, Decretum *c.* FUNGHINI, 20 May 1992, no. 7, in *RRT Decr.*, 10 (1992), p. 97.

[160] Cf. RRT, Decretum *c.* COLAGIOVANNI, 29 March 1990, nn. 3-4 and 8, in *RRT Decr.*, 8 (1990), pp. 74, 76.

[161] RRT, Decretum *c.* DEFILIPPI, 20 February 2003, B.Bis 18/03, no. 5, in FANELLI, *Relatio*-IV, p. 154, citing no. 7 of a 25 November 1975 Decretum *c.* FERRARO.

renounces the right to have an advocate, and thus remits himself to the justice of the tribunal,[162] or when the party simply does not choose to appoint an advocate.[163] Nor is the non-admission of a particular person as advocate a denial of the right of defence, since advocates must be admitted by the competent authority to act before the tribunal (*CIC* c. 1483; *CCEO* c. 1141; *DC* art. 105, §§1-2).[164]

The argument from ignorance does not cause the sentence to be null when the party did not have an advocate (cf. *CIC* c. 15; *CCEO* c. 1497).[165] As was noted above, the judge may appoint an advocate *ex officio* if he judges this to be necessary. The legislator does not tell the judge when this is necessary, and so this is an act of his discretion; thus, as a rule, his failure to appoint an advocate when this was, or should have been deemed, necessary does not constitute a denial of the right of defence. "It is indeed *one thing* to say that an advocate *is necessary* … but it is another thing to say that *one is required for the validity* of the sentence. There is no invalidating norm, and without one there is no nullity."[166]

Complaints of the party against the manner in which the appointed advocate exercised his role typically have no bearing on the validity of the sentence. The advocate has the right freely to carry out his technical function without being accountable to his client (e.g., by submitting his arguments to the party for approval).[167] The party's complaint that the procurator-advocate

[162] Cf. RRT, Decretum *c*. SABLE, 21 November 1995, no. 8, in *RRT Decr*., 13 (1995), p. 139.

[163] Cf. RRT, Sententia definitiva *c*. ANNÉ, 1 February 1964, no. 2, in *RRT Dec*., 56 (1964), p. 75, cited in *RRT Decr*., 13 (1995), p. 139: "There can be no equivocation between the denial of the right of defence and the non-appointment of an advocate." "… nowhere is it prescribed that a party is in fact to defend himself personally or through an advocate in a contentious process, since he can forsake his right; but it is absolutely necessary that he can defend himself or debate personally or through another" (see Decretum *c*. GIANNECCHINI, 24 March 1994, nn. 5 and 11, in *RRT Decr*., 12 [1994], pp. 45-46, 48). Cf. also Decretum *c*. SERRANO RUIZ, 15 March 1985, no. 7, in *RRT Decr*., 3 (1985), pp. 87-88; Decretum *c*. FALTIN, 25 May 1987, no. 9d, in *RRT Decr*., 5 (1987), p. 83.

[164] Cf. RRT, Decretum *c*. ERLEBACH, 12 April 2002, B.Bis 25/02, no. 3, in FANELLI, *Relatio*-IV, p. 123.

[165] "… infrascripti Patres de Turno censent nullita[tem] præcedentium decisionum ullo modo sustineri posse … *d)* ob præsumptam iuris defensionis violationem viro convento 'relative denegatum', quatenus nempe ipse incapax esset, propter iuris canonici ignorantiam, per seipsum sese defendendi …." (RRT, Decretum *c*. FALTIN, 25 May 1987, no. 9d, in *RRT Decr*., 5 [1987], pp. 81 and 82).

[166] RRT, Decretum *c*. PINTO, 12 December 1980, no. 4b, in *ME*, 107 (1982), p. 22. Cf. also, e.g., Decretum *c*. BURKE, 11 June 1992, no. 7, in *RRT Decr*., 10 (1992), p. 122; Decretum *c*. DEFILIPPI, 20 February 2003, B.Bis 18/03, no. 5, in FANELLI, *Relatio*-IV, pp. 153-154.

[167] "Patronus ex officio non indiget consensu, approbatione vel æstimatione sui patrocinati, eo vel magis quod opera patroni illius in re competentiam et peritiam superat. Patronus ex

never contacted him does not entail a denial of the right of defence. For, given the technical nature of the function of advocate and the whole orientation of the canonical process to the disclosure of the truth, it can be exercised sufficiently without a personal rapport. And it is the burden of the party to contact his juridical representative, not of the judge to coordinate the professional relationship of the advocate and the party.[168] Even when the advocate is deficient in carrying out his function, the party's right of defence, as a rule, is not denied, since the party always retains to right to defend himself personally and to make direct inquiries with the advocate.[169] Similarly, the complaint that the advocate is not sufficiently expert in canon law does not have an impact on the validity of the sentence; for the judgement about the advocate's suitability belongs to the competent authority who governs the tribunal.[170]

5.1.5 — *Illegitimate Designation or Inadequate Intervention of a Curator*

As was discussed above (section 3.2), a person suffering from procedural incapacity due to an affliction with a mental disturbance can only stand trial by means of a legitimately appointed curator. The absence of a curator in such circumstances can cause the nullity of the sentence insofar as, while there is a physical person who would be the respondent, there is practically no respondent since the person is incapable of entering into a procedural relationship with the judge. Such a respondent, therefore, is deprived of the opportunity to exercise the right of defence.[171] The purpose of the designation of a curator is precisely to ensure the protection of the rights of one who cannot exercise these rights, as distinct from the advocate who assists one who is capable of exercising his rights. The institute of the curator is sometimes abused by tribunals in such a way that the designation of one gives rise to a denial of the right of defence.

officio enim præsumptive per se gaudere debet fiducia clientis, primo quia est peritus, secundo quia plena fide fruitur exercitio muneris, parum relevat consensus partis, quæ habitualiter scientia iuridica et experientia iudiciali non pollet" (RRT, Decretum *c*. GIANNECCHINI, 22 July 1994, no. 6, in *RRT Decr*., 12 [1994], pp. 160-161).

[168] "Conventus enim sibi procuratorem et advocatum constituerat, ideoque ab eo optatas notitias sollicitare potuisset. Si hoc non fecit non Tribunal sed semetipsum improbare debet ...." (RRT, Decretum *c*. BRUNO, 3 July 1987, no. 2a, prot. no. 14854, unpublished, p. 3).

[169] Cf. RRT, Decretum *c*. DORAN, 12 July 1990, no. 16, in *RRT Decr*., 8 (1990), p. 140; Decretum *c*. BURKE, 26 March 1992, no. 8, in *RRT Decr*., 10 (1992), p. 38. As it is simply noted elsewhere: "Advocato incumbit clientis patrocinium" (Sententia interlocutoria *c*. PARISELLA, 12 January 1984, no. 13, in *ME*, 111 [1986], p. 294).

[170] Cf. RRT, Decretum *c*. FERREIRA PENA, 9 March 2003, B.Bis 33/03, no. 6, in FANELLI, *Relatio*-IV, p. 157.

[171] Cf. RRT, Decretum *c*. AGUSTONI, 22 March 1983, in *RRT Decr*., 1 (1983), p. 42.

In one cause, a curator was appointed in such a way that the respondent had absolutely no knowledge of the process while it was pending. This led the Rotal *Ponens* reasonably to conclude: "It seems necessary to state that the curator was deputed not to protect the rights of the respondent but to exclude the respondent himself from the process at the outset."[172] The procedural incapacity of a party does not remove his right to receive any information about the process; he retains the right to know about the process to the extent that his condition allows (cf. *DC* artt. 97, §2; 99, §2). Moreover, since his procedural incapacity in principle precludes an ability to exercise his rights, it is incumbent upon the judge to exercise vigilance over the curator's activity, lest the party's right of defence nevertheless be endangered. In one cause, the curator appointed *ex officio* was almost entirely inactive in the case, and the respondent had almost no knowledge about the introduction, development, and conclusion of the process; the need for a curator was even in doubt.[173] The *ex officio* appointment, therefore, far from provided for the party's defence.

As was discussed above (see section 3.3), the designation of a curator for a party who does not lack procedural capacity can render the sentence irremediably null insofar as one placed acts in the name of the party without a legitimate mandate. Another aspect of this is the denial of the party's personal exercise of the right of defence. After a curator was illegitimately appointed for one party, none of the procedural acts were communicated to the party, thus rendering it impossible for the person to enter into the *contradictorium*.[174] Similarly, another curator was illegitimately, and even invalidly, appointed for the respondent, who was uninformed not only of the progression of and decision in the process, but even of the appointment of the curator.[175]

The right of defence is not denied a party, however, who was legitimately declared absent from the process and seemed to lack procedural capacity; in that case, the judge legitimately appointed a curator *ad cautelam* in order to protect her rights.[176] In another case, while the procedural capacity

[172] RRT, Decretum *c*. JARAWAN, 28 May 1993, no. 4, in *RRT Decr*., 11 (1993), p. 126.

[173] Cf. RRT, Decretum *c*. SERRANO RUIZ, 22 March 1999, nn. 4-8, in *RRT Decr*., 17 (1999), pp. 87-90; at no. 9, p. 90, it is succinctly put: "Nam, quamvis curator parti conventæ datus fuerit, hoc non secum tulit totalem absentiam eiusdem partis a iudicio."

[174] Cf. RRT, Decretum *c*. CORSO, 28 February 1990, nn. 9-10, in *RRT Decr*., 8 (1990), pp. 50-51.

[175] Cf. RRT, Decretum *c*. DORAN, 30 June 1989, nn. 6-8, in *RRT Decr*., 7 (1989), pp. 139-140.

[176] Cf. RRT, Decretum *c*. FALTIN, 18 January 2001, B.Bis 7/01, in FANELLI, *Relatio*-IV, pp. 85-86; B. 59/97, "Relazione sull'attività della Rota Romana nell'anno giudiziario 2005," no. III.5, in *QSR* 16 (2006), p. 72 (= "Relazione 2005").

of the respondent (and thus the need for the curator constituted for him *ex officio*) was a disputed point before the tribunal, the party in fact personally exercised the right of defence in many ways.[177] And thus the presence of the curator did not constitute a denial of the right of defence.

5.1.6 — *The Right of Defence in the Introductory Phase of the Process*

The three principal moments of the introductory phase of the process are the presentation of the introductory *libellus*, the citation (which presupposes the admission of the *libellus*), and the formulation of the doubt. Each of them presents unique possibilities for the exercise or denial of the right of defence.

5.1.6.1 — The Introductory *Libellus*

The illegitimate rejection of the *libellus* is typically viewed not so much as a denial of the right of defence, as much as the neglect of a not merely procedural law, or of a substantive right of the party to a trial.[178] In some cases, though, such rejections do seem to be a matter of a prejudicial definitive sentence, prior to which unpublished evidence is admitted; this constitutes a denial of the petitioner's right to bring forward evidence of his claim, to know what evidence is being used to reject the *libellus*, and to pose an argument.[179]

One judgement that the presiding judge makes at the time of the admission of the *libellus* concerns the competence of the tribunal. In some causes of the nullity of marriage, before the judge can declare the tribunal competent, he must receive the consent of the judicial vicar of the domicile of the respondent party, which judicial vicar is first to hear the same respondent (*CIC* c. 1673, 3º-4º; *CCEO* c. 1359, 3º-4º). Failure to do this would amount to a violation of the right of defence, but the respondent's further effective interventions in the trial would sanate this defect.[180]

[177] Cf. RRT, Sententia definitiva *c*. PALESTRO, 19 May 1993, no. 9.B, in *RRT Dec*., 85 (1993), pp. 388-389.

[178] Cf. my "The Rejection of a *Libellus* Due to the Lack of Any Foundation Whatsoever (c. 1505, §2, 4º)," in *StC*, 43 (2009), pp. 379-384.

[179] Cf., e.g., RRT, Decretum *c*. CIVILI, 31 October 1990, in *RRT Decr*., 8 (1990), pp. 164-168, esp. at no. 4. Similar to this is the misuse of the documentary process discussed above (section 2.1.3), which can be considered also a denial of the right of defence for these reasons.

[180] Cf. RRT, Decretum *c*. SERRANO RUIZ, 9 July 1992, no. 3b, in *RRT Decr*., 10 (1992), p. 166.

5.1.6.2 — The Citation

The citation is the foundational moment of the whole process (*CIC* c. 1517). It consists of the calling of the parties to trial (*ad iudicium vocatio*) so that they may come to an agreement about the questions (*concordantia dubiorum*) to be investigated, debated, and decided throughout the course of the process. It is not a mere notification of the respondent about the initiation of the process; rather it is a judicial summons—like the *sub pœna* of the secular judicial system—ordering the respondent either to respond in writing or to appear before the tribunal at a given date and hour in order to give a response to the citation and specifically the allegations (*CIC* c. 1507, §1; *CCEO* c. 1190, §1; *DC* art. 126, §1). It is directed by the judge to any and all parties that are to be summoned, whether private or public. Essential to the citation is the indication of the object of the trial—that is, what is requested (*petitum*) and the reason for which it is requested (*causa petendi*).[181]

When there is truly no citation, the definitive sentence that is ultimately issued is manifestly invalid due to an utter lack of a *contradictorium*, since the respondent is absent from the trial through no fault of his own and due to the malice or grave negligence of the judge. In some causes, the sentence is declared irremediably null since the respondent is altogether absent due to the defect of citation and only first learns of the process some time after the definitive sentence is issued—for example, six months[182] or eight years.[183] When the citation takes place, it is incumbent upon the judge to be certain that the notification has successfully taken place, and this must be demonstrated in the acts (*CIC* c. 1509, §2; *CCEO* c. 1192, §2). One sentence was declared null when the tribunal never cited the respondent since it neither had her correct address nor made any real effort to discover it.[184] The non-citation of the parties in a documentary process likewise causes the nullity of the sentence; for, despite the existence of a document subject to no

[181] Cf. RRT, Decretum *c*. PINTO, 24 May 1985, no. 3, in *RRT Decr*., 3 (1985), p. 141; Decretum *c*. STANKIEWICZ, 26 October 1990, no. 6, in *RRT Decr*., 8 (1990), p. 157; Decretum *c*. CIVILI, 13 March 1991, no. 3, in *RRT Decr*., 9 (1991), p. 36. While the judge is obliged to attach a copy of the *libellus* to the citation, this is not an essential element of the citation (cf. Decretum *c*. TURNATURI, 14 July 1995, no. 28, in *RRT Decr*., 13 [1995], p. 91; Decretum *c*. SERRANO RUIZ, 7 May 1999, no. 7, in *RRT Decr*., 17 [1999], p. 113).

[182] Cf. RRT, Decretum *c*. GIANNECCHINI, 16 June 1984, nn. 7-8, in *RRT Decr*., 2 (1984), pp. 99-100.

[183] Cf. RRT, Decretum *c*. JARAWAN, 28 May 1993, no. 1, in *RRT Decr*., 11 (1993), p. 125. At no. 2 (*ibid*.), it says: "... tantummodo ope citationis ... lis pendere incipit. Cum vero sententia sit definitio seu litis solutio, si lis numquam incœperit, sententia haberi nequit."

[184] Cf. RRT, Decretum *c*. COLAGIOVANNI, 23 January 1990, no. 10, in *RRT Decr*., 8 (1990), p. 33.

contradiction, the parties both have the right to be heard prior to the judge's decision.[185]

The jurisprudence of the Roman Rota promotes an equitable judicial examination of the procedural acts and not a positivistic one. And so, even if a tribunal fails to cite the respondent at the proper time, this denial of the right of defence is considered to be sanated if the respondent in fact came to learn of the process and fully exercise his rights within the process.[186] The same is true of the defender of the bond, who has all the rights of the private parties, including the right to be heard before the admission of the *libellus* and the citation to the concordance of the doubt; nevertheless, if he is not cited or present at the examination of the parties and witnesses, his later inspection of the acts sanates these violations of his right of defence.[187]

There may be legitimate obstacles to completing the citation which the judge cannot overcome. It may in fact be the full intention of the judge to cite the respondent; but his domicile is unknown and the judge makes all reasonable efforts to discover it.[188] The obstacle could be imposed by the respondent himself when he refuses to receive the citation; in one cause, when this occurred, the judge nevertheless made efforts to notify the party continually about the state of the cause.[189]

As was said, the citation must indicate the object of the trial. A defect in this regard can cause the irremediable nullity of the sentence when one or both parties never comes to learn of the actual nature of the trial or the ground used. For instance, in causes of marriage nullity, this defect can occur when the respondent is not told that the process concerns the nullity of the marriage on the specific ground(s) at issue. It is illegitimate never to communicate the grounds to the party and merely to invite him to challenge the cause in general, while supplying only generic information about the process.[190] In one trial, the citation by edict—which is a legitimate form

[185] Cf. RRT, B. 14/07, "Relazione 2007," no. III.7, *cit.* (*vide supra* note 39), p. 83.

[186] Cf. RRT, Decretum *c.* CORSO, 17 October 1990, no. 3, in *RRT Decr.*, 8 (1990), p. 143; Sententia definitiva *c.* FAGIOLO, 30 October 1968, and Sententia definitiva *c.* JULLIEN, 8 February 1936, both cited in *RRT Decr.*, 3 (1985), p. 38.

[187] Cf. RRT, Sententia interlocutoria *c.* STANKIEWICZ, 31 January 1989, no. 7, in *RRT Dec.*, 81 (1989), pp. 95-96.

[188] Cf. RRT, Decretum *c.* SERRANO RUIZ, 7 May 1999, nn. 4-5, in *RRT Decr.*, 17 (1999), p. 112. This is to be well established in the acts.

[189] Cf. RRT, Decretum *c.* CIANI, 22 October 2003, B.Bis 95/03, nn. 2-3, in FANELLI, *Relatio*-IV, pp. 168-169.

[190] Cf. RRT, Decretum *c.* DI FELICE, 9 May 1984, no. 5, in *RRT Decr.*, 2 (1984), pp. 65-66; Decretum *c.* BOCCAFOLA, 26 October 1995, no. 11, in *RRT Decr.*, 13 (1995), p. 127; Decretum *c.* TURNATURI, 13 June 1996, nn. 27-28, in *RRT Decr.*, 14 (1996), pp. 119-120.

when the respondent cannot be located—the *petitum* and the *causa petendi* were lacking, causing the nullity of the sentence.[191]

The decree of absence, properly speaking, refers principally to a party's unwillingness to respond to the citation (*CIC* c. 1592; *CCEO* c. 1272; *DC* art. 138), not so much his failure to present evidence—though this, too, can be a form of absence (cf. *DC* art. 142). While the judge's failure to issue a decree of the respondent's absence from the trial does not itself cause the nullity of the sentence,[192] such a decree should be issued and published to the respondent. In one cause, this was not done, and the respondent was never given the opportunity to appreciate the gravity of the object of the trial, since the citation consisted only of a generic invitation to schedule a time for a deposition.[193] The illegitimate declaration of absence of a party can be symptomatic of a denial of the right of defence; in one cause, this was done when the respondent insisted that she be judicially examined before her local ecclesiastical tribunal instead of the tribunal of the petitioner's domicile which was handling the cause.[194]

5.1.6.3 — The Formula of the Doubt and Its Alteration

The pinnacle of the introduction of the cause is the decree of the judge that defines the terms of the controversy. This is called the formula of the doubt, since it states the precise question that is to be explored in the instruction and debate and ultimately resolved in the definitive sentence. In the ordinary contentious process in general, the formula of the doubt is "taken from the petitions and responses of the parties" (*CIC* c. 1513; *CCEO* c. 1195, §1); this is true in the marriage nullity process as well, but the judge can act *ex officio* in this decree by assigning the proper *nomen iuris* to the facts presented by the parties in the *libellus* and in their responses to the citation (*DC*, art. 135, §1). The parties may have recourse against this decree to the competent judge—ordinarily, the college of judges—but the rejection of such a recourse, duly considered, does not constitute a denial of the right of defence.[195]

The right of defence is denied to one or both parties when the formula of the doubt is in fact never communicated to them; for "the right of defence

[191] Cf. RRT, B. 68/06, "Relazione 2006," no. III.4, *cit*. (*vide supra* note 55), p. 102.
[192] Cf. RRT, Decretum *c*. CABERLETTI, 14 October 2003, B.Bis 90/03, no. 5, in FANELLI, *Relatio*-IV, p. 167; B. 160/08, "Relazione 2009," no. III.4, *cit*. (*vide supra* note 60), p. 65.
[193] Cf. RRT, B. 127/05, "Relazione 2006," no. III.4, *cit*. (*vide supra* note 55), p. 105.
[194] Cf. RRT, B. 134/07, "Relazione 2008," no. III.4, *cit*. (*vide supra* note 33), p. 47.
[195] Cf. RRT, Decretum *c*. JARAWAN, 21 April 1993, no. 5, in *RRT Decr*., 11 (1993), p. 63; Decretum *c*. COLAGIOVANNI, 16 November 1993, no. 15, in *ibid*., pp. 200-201.

evidently cannot be exercised unless the party in the cause knows the object of the controversy."[196] Sometimes this occurs when the respondent is never told the correct ground, and this is all the more serious when the ground pertains to the respondent's matrimonial consent; in one cause the party was told that the ground concerned his alleged simulation, while in fact the ground dealt with his alleged incapacity.[197] Just as with the citation, however, the violation of the right of defence caused by an omission of the communication of the formula of the doubt or its incorrect denomination in the communication may be sanated when the party later comes to learn the grounds during the course of the instruction or during the publication of the acts.[198] Similarly, although this is a procedural error, the formula of the doubt could be altogether lacking at the level of appeal without denying the right of defence;[199] for as was mentioned above, the first instance sentence makes the formulation of the doubt implicit in the second instance trial (*CIC* c. 1639, §1; *CCEO* c. 1320, §1), and the parties may acquire certitude that the formula of the doubt is the same as in first instance by means of the instruction of the cause or in the general communications from the tribunal.[200]

At times, though, the non-communication of the formula of the doubt is followed by other illegitimate concealments of the process from the respondent, redounding to the irremediable nullity of the sentence. In one cause, the respondent never knew the allegation—incapacity to assume the essential obligations of marriage on his part—since the formula of the doubt was never communicated to him, the judicial examination of him did not imply the ground, it was not mentioned anywhere in the acts published to him, and a copy of the sentence was never given to him.[201] In another cause, the respondent

[196] SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Decretum Congressus, 18 December 1996, prot. no. 27000/96 CG, cited in DANEELS, "La querela di nullità," *cit*. (*vide supra* note 32), p. 247, note 26.

[197] Cf. RRT, Decretum *c*. PINTO, 24 May 1985, no. 3, in *RRT Decr*., 3 (1985), p. 141. Se Cf. also Decretum *c*. ALWAN, 15 February 2000, B.Bis 16/00, no. 7a, in FANELLI, *Relatio*-IV, p. 46.

[198] Cf. RRT, Decretum *c*. RAGNI, 26 October 1993, nn. 5-7, in *RRT Decr*., 11 (1993), pp. 174-176; Decretum *c*. TURNATURI, 14 July 1995, no. 25, in *RRT Decr*., 13 (1995), p. 90; Decretum *c*. CIVILI, 5 May 1999, no. 8, in *RRT Decr*., 17 (1999), p. 109; Decretum *c*. ERLEBACH, 12 April 2002, B.Bis 25/02, nn. 10-11, in FANELLI, *Relatio*-IV, p. 123.

[199] Cf. RRT, Decretum *c*. RAGNI, 19 October 1993, no. 11, in *RRT Decr*., 11 (1993), pp. 167-168; Decretum SERRANO RUIZ, 1 March 1996, no. 6, in *RRT Decr*., 14 (1996), p. 38; Decretum *c*. CABERLETTI, 14 October 2003, B.Bis 90/03, no. 3, in FANELLI, *Relatio*-IV, p. 167, at B; Decretum *c*. AROKIARAJ, 28 May 2010, no. 7, in *SCL*, 6 (2010), p. 394.

[200] Cf., e.g., RRT, Sententia definitiva *c*. DEFILIPPI, 27 November 1998, no. 5b, in *RRT Dec*., 90 (1998), p. 790; Sententia definitiva *c*. VERGINELLI, 26 July 2002, no. 6, in *RRT Dec*., 94 (2002), p. 501.

[201] Cf. RRT, Decretum *c*. FUNGHINI, 24 May 1989, nn. 11-14, in *RRT Decr*., 7 (1989), pp. 105-106.

was never clearly told the grounds of alleged nullity, despite her four explicit requests; and since the acts were never published to her, she had no way of knowing the grounds before the issuance of the definitive sentence.[202]

As was discussed above (see section 4.2), when the judge alters the formula of the doubt on his own initiative just before issuing the decision and unbeknownst to the parties, the sentence is irremediably null due to the defect of a judicial petition. This act also can cause the same nullity due to a denial of the right of defence, since the parties never have an opportunity to know the allegation, present supporting or contrary evidence, or advance any arguments pertaining to the new ground(s).[203]

The terms of the controversy may be validly modified any time prior to the issuance of the definitive sentence, *servatis servandis* (*CIC* c. 1514; *CCEO* c. 1196; *DC* art. 136).[204] Accordingly, the parties may request such a modification before that time, and the judge is obliged to answer the request by decree. Failure to do so may cause the irremediable nullity of the sentence due to a denial of the right of defence. In one cause, when the petitioner legitimately requested the addition of a ground after the conclusion in the cause, the presiding judge deferred the question to the college of judges which was about to render a decision in the case. Instead of deciding whether or not to admit the ground, it gave a definitive negative response to the allegation, and the Rota declared the sentence null, since a judgement was made without the opportunity to present evidence and arguments and without a *contradictorium*.[205]

5.1.6.4 — Objection of Suspicion of a Judge

A basic right of the parties is that of knowing the names of the judges and the public parties at the beginning of the process. They have the right to object to them, and such an objection is resolved by the presiding judge, the judicial vicar or the bishop moderator, as the case may be (*CIC* c. 1449;

[202] Cf. RRT, Decretum *c*. DORAN, 26 March 1992, nn. 6-7, in *RRT Decr*., 10 (1992), p. 44.

[203] Cf., e.g., RRT, Decretum *c*. BURKE, 21 June 1990, no. 9, in *RRT Decr*., 8 (1990), p. 120; Decretum *c*. BOCCAFOLA, 16 April 1991, no. 15, in *RRT Decr*., 9 (1991), p. 51; Decretum *c*. BRUNO, 21 July 1995, nn. 7 and 10b, in *RRT Decr*., 13 (1995), pp. 102, 103; Decretum *c*. FUNGHINI, 24 July 1996, no. 7, in *RRT Decr*., 14 (1996), p. 164; Decretum *c*. BURKE, 22 May 1997, no. 22, in *RRT Decr*., 15 (1997), p. 93; Decretum *c*. BURKE, 4 June 1998, no. 5, in *RRT Decr*., 16 (1998), p. 183.

[204] Cf. RRT, Decretum *c*. BOCCAFOLA, 22 March 2001, B.Bis 29/01, no. 6, in FANELLI, *Relatio*-IV, p. 90.

[205] Cf. RRT, Sententia interlocutoria *c*. PALESTRO, 7 February 1990, no. 7, in *RRT Dec*., 82 (1990), pp. 87-88.

CCEO c. 1107). Typically, the legitimate rejection of an objection of suspicion against a judge does not amount to a denial of the right of defence.[206] The objection may even be rejected *in limine* such as when it is generically lodged against the whole tribunal, not against individual ministers of the tribunal.[207]

The question of the right of defence does arise, though, when the objection proposed is never resolved. Since the procedural relationship of the judge and the parties is seriously tainted when one of the judges lacks the impartiality that is essential for judicial independence, when a legitimately posed objection of suspicion is overtly ignored, it can result in the irremediable nullity of the sentence due to the denial of the right of defence.[208] At other times when the objection is not resolved, other circumstances may indicate that the right of defence has not truly been denied. In one case, the exception was never resolved, but this was due principally to the fact that the parties never appeared before the judge when he summoned them to discuss the matter. Thus, he presumed that the party was renouncing the objection; while he was still obliged to issue a decree on that question, this omission did not result in the denial of the party's defence.[209]

5.1.7 — *The Right of Defence in the Instructional Phase*

The instructional phase of the process is instituted by the decree of the judge that prescribes a suitable amount of time for the presentation of evidence, commonly called the decree of instruction (*CIC* c. 1516; *CCEO* c. 1198; *DC* art. 137). It has three essential components: the presentation of evidence, the publication of the acts, and the conclusion in the cause. These components correspond to three fundamental procedural rights of the parties, the denial of which can cause the irremediable nullity of the sentence: the right to present evidence (*ius ad probationes*), the right to inspect the

[206] Cf., e.g., RRT, Decretum *c.* FIORE, 30 April 1983, no. 7, in *RRT Decr.*, 1 (1983), p. 63; Decretum *c.* SABLE, 19 January 1996, nn. 6-9, in *RRT Decr.*, 14 (1996), pp. 4-5.

[207] Cf., e.g., RRT, Sententia interlocutoria *c.* PARISELLA, 12 January 1984, no. 14, in *ME*, 111 (1986), p. 294.

[208] Cf., e.g., RRT, Decretum *c.* BOCCAFOLA, 13 February 1988, no. 12, in *RRT Decr.*, 6 (1988), pp. 37-38. In this case the objection was raised against two of the judges, a majority of the college.

[209] Cf. RRT, Decretum *c.* BRUNO, 29 March 1996, no. 5, in *RRT Decr.*, 14 (1996), pp. 62-63. In another case, the objection against the presiding judge was not dealt with prior to the issuance of the definitive sentence, but the Rota explained that the aggrieved party enjoyed the full exercise of the right of defence with respect to the principal cause (cf. Sententia definitiva *c.* HUBER, 23 February 2001, no. 22b, in *RRT Dec.*, 93 [2001], pp. 197-198).

acts enjoyed by the parties and their advocates, and the right to the legitimate conclusion of the period for the instruction. Let us explore how Rotal jurisprudence has examined the alleged denial of each of these rights.

5.1.7.1 — The *ius ad probationes*

The normative method for examining parties, witnesses, and experts is that the person appears alone before the judge, who is assisted by a notary, with advocates, the defender of the bond, and the promoter of justice being present, when they are involved in the trial. The law prescribes additional formalities that help to establish the authenticity of the written act of the examination.[210] A diversion from this normative manner of acquiring a judicial statement does not in itself invalidate the sentence;[211] it may even be legitimate or necessary in some situations.[212] However, not only is the use of questionnaires as the ordinary method of gathering statements from the parties and witnesses a generally illegitimate practice given its exceedingly limited ability to uncover the truth, but it may also constitute a denial of the right of defence when a party wishes to give a statement only orally before the judge or auditor. In this sense, we can speak about the parties' *right to a judicial examination*. In one cause, the respondent was told to give his statement by filling out a questionnaire and he was in fact denied the opportunity (several times requested) to appear before the judge to give his statement in person.[213]

Parties also have the *right to the introduction and judicial examination of witnesses*. The judge's decision, whether intentional or by neglect, not to judicially examine witnesses introduced by a party can cause the irremediable nullity of the sentence.[214] This defect is all the more serious when the witnesses would have shed significant light on the truth of the question

[210] Cf. *CIC* cc. 1560-1561, 1567-1569; *CCEO* cc. 1241-1242, 1248-1250; *DC* artt. 165-166, 173-175.

[211] Cf., e.g., RRT, Decretum *c*. PINTO, 13 November 1998, in *RRT Decr*., 16 (1998), p. 335. In this case, the parties' declarations were obtained prior to the formulation of the doubt, and witnesses solely gave written responses to mailed questionnaires.

[212] Cf. *DC* art. 161. For example, in one case, the deposition of the respondent was taken by the judge in prision in the absence of the notary, but the notary signed it verifying its authenticity (cf. cc. 1527, §1; 1528) (cf. RRT, A. 101/04, "Relazione 2006," no. III.4, *cit*. [*vide supra* note 55], p. 107).

[213] Cf. RRT, Decretum *c*. BOCCAFOLA, 13 February 1988, nn. 10 and 12, in *RRT Decr*., 6 (1988), pp. 35-36, 37.

[214] Cf. RRT, Decretum *c*. BOCCAFOLA, 4 February 1993, no. 11, in *RRT Decr*., 11 (1993), p. 20.

before the tribunal. In a cause of the nullity of marriage decided in the affirmative by the first instance tribunal, the second instance judge unjustly prohibited the examination of witnesses introduced by the respondent who were opposed to the nullity of marriage, some of whom were pre-matrimonial and matrimonial witnesses.[215] The denial of a party's right of defence becomes compounded when both the party and the witnesses introduced are not judicially examined. In one cause, the two witnesses introduced by the respondent were neither judicially examined nor even cited; the party herself was never deposed, nor was her full written response included in the acts.[216]

After the instruction of the cause has been carried out, the parties, as we will discuss below, have the right to examine the evidence. One of the purposes of this right is "to complete the proofs" after ascertaining the state of the evidence (*CIC* c. 1598, §1; *CCEO* c. 1281, §1); in other words, parties have the *right to present supplementary evidence after the publication of the acts*. A denial of this right can cause the irremediable nullity of the sentence since it is integral to the *ius ad probationes*. In one cause, after the publication of the acts, the respondent requested a supplementary examination of the petitioner and three witnesses, and the deposition of a new witness; this request was completely ignored (a tacit and arbitrary denial of the request), and the judge proceeded to decree the conclusion in the cause.[217]

As was discussed above (see section 5.1.6.3), the formula of the doubt provides direction to the whole instruction of the cause: it pronounces the object of the trial and thus indicates the kinds of proof that the petitioner (and even the respondent) may need to bring forward in order to prove his allegations and that opposing parties may need to bring forward in order to counter the allegations. Naturally, the judge is restricted in the judicial investigation by the decree of the formula of the doubt, which is why the collection of evidence prior to the formula of the doubt may only be done for a grave reason (*CIC* c. 1529; *CCEO* c. 1210). The parties have a *right to a focussed, limited judicial investigation*. If the judge carries out instruction that is *extra petita*—that is, pertaining to a ground that is not established in the formula of the

[215] Cf. RRT, Decretum *c*. FUNGHINI, 20 May 1992, no. 8, in *RRT Decr*., 10 (1992), p. 98.

[216] Cf. RRT, Decretum *c*. POMPEDDA, 19 October 1992, no. 8, in *RRT Decr*., 10 (1992), pp. 183-184. In another case, the tribunal issued the sentence without deposing the respondent and his witnesses; the sole judge revoked the sentence and heard them, but proceeded to issue a new sentence without hearing the new witnesses introduced by the petitioner or publishing the acts to the respondent (cf. RRT, Decretum *c*. PINTO, 23 October 1998, in *RRT Decr*., 16 [1998], pp. 314-317).

[217] Cf. RRT, Decretum *c*. BRUNO, 19 July 1996, nn. 4-5, in *RRT Decr*., 14 (1996), pp. 143-144.

doubt—this defect may amount to a denial of the parties' right of defence, since they may never have had the opportunity to present or counter evidence pertaining to that ground. In one cause, the instruction in the cause pertained not to the doubt legitimately established by decree but to another ground that seemed more suitable to the judge; thus the object of the trial was *de facto* altered without the knowledge or consent of the parties.[218]

The *ius ad probationes* is not absolute. Since the whole process is conducted under the direction and moderation of the judge, the introduction of evidence into the trial is always subject to judicial authority. The judge has the faculty legitimately to limit the introduction of evidence.[219] Thus when he legitimately curbs an excessive number of witnesses or other instruments of proof by carefully exercising his proper discretion, the right of defence is not denied.[220]

While the burden of proof rests on the one who makes an allegation, the judge can supply for the parties' negligence in attaining proofs in order to avoid a seriously unjust decision, and he must do so in penal causes and other causes pertaining to the public good of the Church or the *salus animarum* (*CIC* c. 1452; *CCEO* c. 1110; *DC* art. 71). Despite the seriousness of this obligation of the judge, neglect of it does not in itself cause the denial of the right of defence of the parties.[221] For the burden of proof remains that of the party. "Moreover the right of defence is not violated by a defect of proofs. It is the petitioner's burden to advance proofs, not the judge's. [Canon 1452] does not lead to any nullification."[222]

Moreover, the judge's neglect in attaining proof required by law does not even invalidate his sentence. The typical example is the expert report, which must be obtained especially in causes pertaining to the nullity of marriage when it is alleged that a party is incapable of consent or is afflicted with the impediment of impotence (*CIC* c. 1680; *CCEO* c. 1366; *DC* art. 203). The judge's failure to obtain an expert report in such causes does not invalidate

[218] Cf. RRT, Decretum *c*. BOCCAFOLA, 5 April 2001, B.Bis 45/01, nn. 10-11, in FANELLI, *Relatio*-IV, p. 93.

[219] Cf. *CIC* cc. 1527, §2; 1553; *CCEO* cc. 1208, §2; 1228 (*sub iudicis moderatione*); 1234; *DC* art. 157, §3.

[220] Cf. RRT, Decretum *c*. STANKIEWICZ, 15 March 2002, B.Bis 20/02, no. 6, in FANELLI, *Relatio*-IV, pp. 121-122 (witnesses); B. 77/04, "Relazione 2005," *cit*. (*vide supra* note 176), no. III.5, p. 72 (other instruments); A. 8/06, "Relazione 2006," no. III.4, *cit*. (*vide supra* note 55), p. 107 (private experts); B. 108/07, "Relazione 2009," no. III.4, *cit*. (*vide supra* note 60), p. 65 (a second hearing of the petitioner and her witnesses).

[221] Cf. RRT, Decretum *c*. DORAN, 12 July 1990, no. 16, in *RRT Decr*., 8 (1990), p. 140.

[222] RRT, Sententia interlocutoria *c*. FUNGHINI, 29 November 1990, no. 9, in *RRT Dec*., 82 (1990), p. 829.

the sentence,[223] since this defect pertains not to the personal defence of the parties but to the merits of the cause. And while an expert report is most suitability based on a personal examination of the allegedly incapable party, the judge's decision to ask the expert solely for a *votum super actis* likewise does not invalidate the sentence.[224]

Similar to what happens with the defect of the citation and the communication of the formula of the doubt, violations of the right of defence arising from defects in the manner of instruction are sanated by the later intervention of the parties and thus do not entail a denial of the right of defence. For example, when the names of witnesses are not communicated to the respondent's procurator-advocate and defender of the bond, their opportunity to contribute to the instruction and review the acts later repair this violation of their right.[225] Similarly, when names of the witnesses are not communicated before their examination to the respondent, this right is protected by the fact that the party has a procurator-advocate who enjoys the right to be present at their examination and examine the acts before their publication.[226] In one cause, the procurator-advocate could not be present at the examination of the witnesses, since the date and location of the examination was never communicated to him; this violation of the procurator-advocate's right to be present at the examination was repaired by the right to propose questions prior to the examination and by the later publication of the acts.[227]

5.1.7.2 — The Publication of the Acts

The defect in the ordinary contentious process that most frequently contributes to or singularly causes a denial of a party's right of defence is the

[223] "Nec nullitas exsurgit ex eo quod Iudex peritum non nominaverit; etenim, iudicium de opportunitate peritiæ ipsi iudici reservatur (can. 1680). Forsan Iudex imprudenter vel inepte egit, at ubinam nullitas urgetur" (RRT, Decretum *c*. DORAN, 12 July 1990, no. 16, in *RRT Decr*., 8 [1990], p. 140, quoting the *votum pro rei veritate* of the promoter of justice). Cf. also Decretum *c*. RAGNI, 6 May 1986, no. 4, in *RRT Decr*., 4 (1986), p. 59; Decretum *c*. BOCCAFOLA, 5 May 1988, no. 12, in *RRT Decr*., 6 (1988), p. 110. In one case, it was a question of obtaining a new expert report (cf. B. 5/09, "Relazione 2009," no. III.4, *cit*. [*vide supra* note 60], p. 65).

[224] Cf. RRT, Decretum *c*. DE ANGELIS, 20 May 2005, B. 45/05, "Relazione 2005," *cit*. (*vide supra* note 176), no. III.5, p. 73 (see p. 191, note 84 in *ibid*.).

[225] Cf. RRT, Decretum *c*. FERREIRA PENA, 6 February 2003, B.Bis 10/03, no. 4, in FANELLI, *Relatio*-IV, pp. 151-152; B. 17/02, "Relazione sull'attività della Rota Romana nell'anno giudiziario 2003," no. II.5b, in *QSR*, 14 (2004), p. 149.

[226] Cf. RRT, Decretum *c*. STANKIEWICZ, 8 March 2002, B.Bis 17/02, no. 7, in FANELLI, *Relatio*-IV, pp. 119-120.

[227] Cf. RRT, Decretum *c*. FERREIRA PENA, 6 February 2003, B.Bis 10/03, no. 4, in FANELLI, *Relatio*-IV, pp. 151-152.

judge's failure to publish the acts of the cause. The norm of law imposes several obligations upon the judge in carrying out this step (*CIC* c. 1598, §1; *CCEO* c. 1281, §1; *DC* artt. 229-230):

> Once the proofs have been acquired, the judge by a decree must under pain of nullity permit the parties and their advocates to inspect the acts not yet known to them at the chancery of the tribunal; moreover, a copy of the acts can be given to advocates that request one; but in causes pertaining to the public good, in order to avoid most serious dangers, the judge can decree that some act is to be shown to no one, taking care nevertheless that the right of defence always remains intact.[228]

The publication of the acts is a pivotal moment in the *contradictorium* that is essential to the judicial process. For by it, the parties come to know in detail what specific evidence has been advanced in support of or in contradiction to the allegations, and they have the opportunity to respond either simply by their own additional assertions or by supplying new evidence. Advocates, who may already have an intimate knowledge of the evidence (cf. *CIC* c. 1561; *CCEO* c. 1338), may begin to craft their arguments and to counsel their clients in concrete ways regarding the supplementation of the evidence. Evidently, the defect of the publication of the acts is a serious procedural error.

The canon in itself establishes that the non-publication of the acts, or some defect in its publication, causes the decree of publication to be invalid (*iudex decreto … permittere debet, sub pœna nullitatis*). Thus, a defect in the publication in itself causes only the remediable nullity of the sentence, since the sentence would be based on a null judicial act (*DC* art. 231; *CIC* c. 1622, 5º; *CCEO* c. 1304, §1, 5º). For instance, if the sentence is published only to the advocates and not the parties, the decree of publication is invalid since its publication also to the parties is required for validity; and in such a case, the right of defence is not practically denied the parties, since their personal defenders have full access to the acts. We read the following in an important decree *coram* Stankiewicz:

> Although the publication of the acts is intimately connected with the right of defence, such that the juridical necessity of publication seems to arise from the need to protect the right of defence of both parties in the cause,

[228] Can. 1598 — § 1. Acquisitis probationibus, iudex decreto partibus et earum advocatis permittere debet, sub pœna nullitatis, ut acta nondum eis nota apud tribunalis cancellariam inspiciant; quin etiam advocatis id petentibus dari potest actorum exemplar; in causis vero ad bonum publicum spectantibus iudex ad gravissima pericula evitanda aliquod actum nemini manifestandum esse decernere potest, cauto tamen ut ius defensionis semper integrum maneat.

> nevertheless, the sphere of this obligation, imposed by canon law under "pain of nullity," surpasses the limits of the right of defence.
>
> And this happens, for example, whenever the ability (*facultas*) to view the acts is not granted to the parties themselves by the decree of publication but only to their advocates, who have properly received from the parties themselves the juridical representation of the cause, or its defence, by an authentic mandate (cf. canon 1484, §1).
>
> For, although in such a case the parties are not practically deprived of the right to defend themselves, since the advocates can effectively exercise the defence in their name according to the norm of law, nevertheless an exclusion of this kind gravely harms the right to view the acts, which under pain of nullity canon law cumulatively affords the parties and their advocates, but not only alternately.
>
> Therefore, in this situation, due to the unobserved limits of the act of publication established by canon law, but especially on account of the denial of the parties' right to view the acts independently of their advocates, not only does the nullity of the act take its effect but also the remediable nullity of the sentence, which is based on a null judicial act ….[229]

A deficient observance of the norm, therefore, does not always amount to a denial of the right of defence causing the irremediable nullity of the sentence.

Although the norm says nothing directly about the nullity of the sentence, it is the constant and common jurisprudence of the Roman Rota that the non-publication of the acts causes the irremediable nullity of the sentence due to the denial of the parties' right of defence. The just-quoted decree *coram* Stankiewicz in fact goes on to say: "Moreover, if in this situation either or both of the parties does not use the juridical representation of an advocate, the denial of the parties' right to view the acts necessarily carries with it the denial of the right to defend themselves and consequently the irremediable nullity of the sentence (c. 1620, 7º)."[230] Moreover, the publication solely to a party's advocate and not to the party has no effect if the advocate is entirely idle in the defence of the party's rights.[231]

[229] RRT, Decretum *c*. STANKIEWICZ, 28 July 1994, no. 13, in *RRT Decr*., 12 (1994), p. 174. Cf. also Decretum *c*. DAVINO, 14 December 1989, no. 9, in *RRT Decr*., 7 (1989), p. 209; Decretum *c*. COLAGIOVANNI, 12 October 1993, nn. 10 and 17, in *RRT Decr*., 11 (1993), pp. 146, 150; Decretum *c*. DORAN, 20 January 1994, no. 7f, in *RRT Decr*., 12 (1994), p. 6; RRT, Decretum *c*. DEFILIPPI, 25 July 1997, no. 7, in *RRT Decr*., 15 (1997), p. 175.

[230] RRT, Decretum *c*. STANKIEWICZ, 28 July 1994, no. 13, in *RRT Decr*., 12 (1994), p. 174.

[231] Cf. RRT, Decretum *c*. BURKE, 22 May 1997, nn. 19-21, in *RRT Decr*., 15 (1997), pp. 92-93.

The non-publication of the acts can take different forms. It may simply be a matter of the total non-publication of the acts to anyone.[232] This is especially serious when the party to whom the acts are not published has no advocate.[233] This serious violation of a substantial right is especially offensive to basic justice and right reason when the decree of publication claims to publish the acts only to a fictional advocate or procurator instead of to the party—that is, when in fact the party has no advocate or procurator.[234] Sometimes there is a decree of the publication of the acts, but the decree is never communicated to one or both parties, thus in effect never publishing the acts to them.[235] The decree of the publication of the acts is particularly infected with error when it manifestly declares the non-publication of the acts; one so-called "decree of publication" self-exempted the tribunal "from publi[shing] the declaration of the petitioner, the declarations of the parties, the observations of the defender of the bond, the expert report and the definitive sentence!"[236] The violation of canon 1598, §1 can sometimes reach the point of absurdity; in one tribunal, the acts were published by the auditor (a religious sister) only to the procurator-advocate of the parties, but

[232] Cf. RRT, Decretum *c*. BURKE, 30 April 1992, no. 3, in *RRT Decr*., 10 (1992), p. 81; Decretum *c*. CIVILI, 17 February 2000, B.Bis 19/00, in FANELLI, *Relatio*-IV, pp. 46-47; Decretum *c*. AROKIARAJ, 28 May 2010, in *SCL*, 6 (2010), pp. 389-396.

[233] Cf. RRT, Decretum *c*. BOCCAFOLA, 26 October 1995, no. 12, in *RRT Decr*., 13 (1995), pp. 127-128; Decretum *c*. TURNATURI, 13 June 1996, no. 30, in *RRT Decr*., 14 (1996), pp. 120-121; Decretum *c*. FUNGHINI, 24 July 1996, no. 4, in *ibid*., p. 163; Decretum *c*. SERRANO RUIZ, 24 May 2002, B.Bis 40/02, no. 3, in FANELLI, *Relatio*-IV, p. 126.

[234] The frequency of this error is baffling: cf., e.g., RRT, Decretum *c*. DORAN, 19 May 1988, no. 13, in *RRT Decr*., 6 (1988), p. 129; Decretum *c*. DORAN, 18 May 1989, no. 10, in *RRT Decr*., 7 (1989), p. 92; Decretum *c*. BOCCAFOLA, 25 July 1989, no. 16, in *ibid*., pp. 146-147; Decretum *c*. STANKIEWICZ, 26 October 1990, no. 16, in *RRT Decr*., 8 (1990), p. 162; Decretum *c*. BURKE, 15 November 1990, no. 20c, in *ibid*., p. 175; Decretum *c*. COLAGIOVANNI, 11 December 1990, no. 5, in *ibid*., p. 198; Decretum *c*. BURKE, 14 March 1991, no. 3d, in *RRT Decr*., 9 (1991), p. 40; Decretum *c*. GIANNECCHINI, 19 July 1991, no. 3, in *ibid*., p. 105; Decretum *c*. SERRANO RUIZ, 11 November 1991, no. 5b, in *ibid*., pp. 139-140; Decretum *c*. DORAN, 2 February 1992, no. 7d, in *RRT Decr*., 10 (1992), p. 60; Decretum *c*. BURKE, 11 June 1992, no. 8, in *ibid*., p. 122; Decretum *c*. JARAWAN, 23 June 1993, no. 5, in *RRT Decr*., 11 (1993), pp. 134-135; Decretum *c*. STANKIEWICZ, 28 July 1994, nn. 22-23, in *RRT Decr*., 12 (1994), pp. 178-179; B. 67/06, "Relazione 2006," no. III.4, *cit*. (*vide supra* note 55), p. 105.

[235] Cf., e.g., RRT, Decretum *c*. DORAN, 18 May 1989, no. 7, in *RRT Decr*., 7 (1989), p. 91; Decretum *c*. DORAN, 26 March 1992, no. 9, in *RRT Decr*., 10 (1992), pp. 48-49; Decretum *c*. DORAN, 26 November 1992, no. 13, in *ibid*., p. 204; Decretum *c*. BOCCAFOLA, 4 February 1993, no. 12, in *RRT Decr*., 11 (1993), p. 20.

[236] RRT, Decretum *c*. ERLEBACH, 26 October 2001, B.Bis 111/01, in FANELLI, *Relatio*-IV, p. 102.

the auditor was in fact both parties' procurator-advocate. "She thus published all the acts only to herself!"[237]

Other times the proper meaning of the publication of the acts is distorted, such that it is not treated as the right of the parties personally to examine the printed acts themselves. In one tribunal there has been the practice of only informing the parties orally about the contents of the acts.[238] In another tribunal, not only were the acts not published to the parties, but the advocates' right to inspect the acts was arbitrarily restricted such that they had to do so at the tribunal; this amounted to a denial of the right of defence, not only an invalid publication.[239]

At times, the acts are not published only to the respondent, which causes the irremediable nullity of the sentence since such nullity is caused when the right of defence is denied either party (*alterutri parti*). This is serious in itself, but it is especially so when that party is wrongly declared absent and explicitly requests the opportunity to examine the acts.[240] When the respondent is opposed to the declaration of nullity of the marriage,[241] this offence causes suspicion of the influence of a divorce-oriented mentality in the tribunal. In one cause, none of the acts were published to the respondent, and his advocate was sworn to secrecy about them; this exacerbated the fact that the party was never informed about the grounds and other rights were violated.[242] In another cause, the tribunal insisted on a very positivistic understanding of "at the chancery of the tribunal" from the canon; the respondent, who lived in France, could not go to the tribunal adjudicating

[237] RRT, Decretum *c*. BOCCAFOLA, 5 December 1996, no. 12b, in *RRT Decr*., 14 (1996), p. 244.

[238] Cf. RRT, Decretum *c*. BURKE, 16 November 1989, no. 6, in *RRT Dec*., 81 (1989), p. 684; Decretum *c*. DAVINO, 16 May 1991, no. 6, in *RRT Decr*., 9 (1991), p. 68. Both of these decrees concerned causes originating from the same tribunal (*Ruremundensis*). Another *Turnus*, however, judged that the respondent in the case came to know the acts in "at least a summary manner" and thus that this practice was not invalidating (cf. Sententia interlocutoria *c*. FUNGHINI, 29 November 1990, no. 10, in *RRT Dec*., 82 [1990], p. 830); in our opinion, it cannot be said that this view is part of the common jurisprudence of the Roman Rota.

[239] Cf. RRT, Decretum *c*. STANKIEWICZ, 29 March 1996, nn. 11-12, in *RRT Decr*., 14 (1996), pp. 70-71.

[240] Cf. RRT, Decretum *c*. BURKE, 23 July 1991, no. 9, in *RRT Decr*., 9 (1991), p. 112.

[241] Cf. RRT, Decretum *c*. GIANNECCHINI, 28 January 1993, no. 4, in *RRT Decr*., 11 (1993), p. 13.

[242] Cf. RRT, Decretum *c*. TURNATURI, 14 May 1998, nn. 12-15, in *RRT Decr*., 16 (1998), pp. 152-153. Cf. also Decretum *c*. STANKIEWICZ, 29 March 1996, nn. 11-12, in *RRT Decr*., 14 (1996), pp. 70-71.

the cause in the U.S.A. to inspect the acts, and the tribunal refused to arrange for the exercise of this right in another way.[243]

The judge can decide that a certain act (*aliquod actum*) not be published to anyone in order to avoid most serious dangers (*ad gravissima pericula evitanda*). This is clearly an exception in the law that restricts the free exercise of rights, and so it is subject to a strict interpretation (*CIC* c. 18; *CCEO* c. 1500). It cannot, therefore, be extended to all the acts.[244] The judge can "only decree that 'some' act—namely, a *concrete* act—must be treated as being reserved or confidential. Here a clear limit is indicated, and the judge has no right in law to go beyond it."[245] This exception is illegitimately used when the decree describes itself as a "partial" publication and explicitly declares that none of the acts are to be shown to either party, without any explanation as to why any acts were not to be published.[246] It is also illegitimate for a tribunal to reserve to itself the right to deny the right to view the acts "in whole or in part."[247] Nor is it licit to exclude certain pieces of evidence from the publication as a matter of course; this is done in some tribunals with the expert report, which is especially serious when the sentence heavily relies upon it.[248] There is no doubt that the expert

[243] Cf. RRT, Decretum *c*. BURKE, 13 December 1989, nn. 8-9, in *RRT Decr*., 7 (1989), p. 204. See *DC* art. 233, §2.

[244] Cf. RRT, Decretum *c*. DORAN, 19 May 1988, no. 13, in *RRT Decr*., 6 (1988), p. 129; Decretum *c*. BURKE, 21 June 1990, no. 7, in *RRT Decr*., 8 (1990), pp. 119-120; Decretum *c*. STANKIEWICZ, 26 October 1990, no. 13, in *ibid*., p. 161; Decretum *c*. BURKE, 15 November 1990, no. 10, in *ibid*., p. 172; Decretum *c*. BRUNO, 27 March 1992, no. 2d, in *RRT Decr*., 10 (1992), p. 51; Decretum *c*. RAGNI, 26 May 1992, no. 5, in *ibid*., p. 105; Decretum *c*. BURKE, 11 June 1992, nn. 7-8, in *ibid*., p. 114; Decretum *c*. DORAN, 26 November 1992, no. 13, in *ibid*., p. 204; Decretum *c*. GIANNECCHINI, 28 January 1993, nn. 2.3 and 3, in *RRT Decr*., 11 (1993), pp. 11 and 12; Decretum *c*. JARAWAN, 23 June 1993, no. 5, in *ibid*., p. 134; Decretum *c*. FUNGHINI, 11 May 1994, no. 2, in *RRT Decr*., 12 (1994), p. 91; Decretum *c*. BURKE, 22 May 1997, no. 11, in *RRT Decr*., 15 (1997), p. 90.

[245] RRT, Decretum *c*. BURKE, 28 May 1998, no. 7, in *RRT Decr*., 16 (1998), p. 176.

[246] Cf. RRT, Decretum *c*. DORAN, 3 May 1990, no. 11, in *RRT Decr*., 8 (1990), p. 95. Another judge, examining a cause from the same tribunal (*Sancti Antonii*), observes that this decree appears to be created *a priori* without regard for the particular cause; cf. Decretum *c*. SERRANO RUIZ, 11 November 1991, no. 5a, in *RRT Decr*., 9 (1991), p. 139. Regarding the same tribunal's decree publishing the acts, see also Decretum *c*. RAGNI, 26 May 1992, nn. 6-8, in *RRT Decr*., 10 (1992), pp. 105-107.

[247] SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Decretum, 5 October 1989, prot. no. 21163/89 VT, quoted in *RRT Decr*., 10 (1992), p. 121.

[248] Cf. RRT, Decretum *c*. FALTIN, 3 March 1994, no. 13, in *RRT Decr*., 12 (1994), p. 25; Decretum *c*. CABERLETTI, 23 October 2003, B.Bis 94/03, no. 4, in FANELLI, *Relatio*-IV, p. 168. Decretum *c*. STANKIEWICZ, 27 November 2003, B.Bis 119/03, no. 14, in *ibid*., pp. 174-175; B. 50/06, "Relazione 2006," no. III.4, *cit*. (*vide supra* note 55), p. 105; Decretum *c*. BOCCAFOLA, 18 January 2007, B.Bis 3/07, no. 10, unpublished, p. 5; B. 115/07, "Relazione 2008," no. III.4, *cit*. (*vide supra* note 33), p. 46.

report is an instrument of proof that must, as a rule, be just as accessible to the parties as a deposition of a party or witness or a document.

In order to invoke the exception of the law—that is, publishing some act to neither spouse in order to avoid most serious dangers—an immediate, concrete, most serious danger must be identified.[249] Jurisprudence suggests that the following are legitimate examples of this: the danger of subjecting a witness to a criminal trial,[250] the danger of civil litigation,[251] the danger of revealing horrible events of the past which would needlessly cause devastation to someone,[252] or serious and imminent negative consequences for the witness giving a deposition and his family.[253] On the other hand, it is generally illegitimate to identify the following as a most grave danger: the judge's conjecture that a witness will not testify if he knows his testimony will be read by the parties,[254] a perceived "hostility" of a party against the Church or the tribunal,[255] the erroneous notion that it would be a violation of civil law,[256] a concern that the parties will know in whose favour a particular witness spoke,[257] or the fear of merely potential dangers.[258]

Finally, the norm provides that, when this exception must be used, the judge is to take care that the right of defence remain intact. The typical way of fulfiling this prescription is for the judge to encourage the party to designate a procurator-advocate or, if he is unwilling to do so, for the judge to appoint one *ex officio*.[259]

[249] "Exceptionalis provisio ne aliquod actum publicetur … per se tendit ad ius defensionis erodendum. Quanto magis ad hoc tendit, consequitur quod tanto magis immediata (ac non tantum remota), realia (ac non hypothetica), et reapse gravissima (ac non tantum moderata vel levia) oporteat ut pericula instantia sint" (RRT, Decretum *c*. BURKE, 11 June 1992, no. 6, in *RRT Decr*., 10 [1992], p. 114).

[250] Cf. RRT, Decretum *c*. PINTO, 24 May 1985, no. 2, in *RRT Decr*., 3 (1985), p. 141; Decretum *c*. COLAGIOVANNI, 11 December 1990, no. 9, in *RRT Decr*., 8 (1990), p. 199, citing a decree *c*. PINTO, 24 May 1984, no. 2, in *ME*, 113 (1988), p. 315.

[251] Cf. RRT, Decretum *c*. BRUNO, 3 July 1987, no. 2c, prot. no. 14854, unpublished, p. 5; Decretum *c*. COLAGIOVANNI, 8 May 1990, no. 7, in *RRT Decr*., 8 (1990), p. 99; Decretum *c*. COLAGIOVANNI, 30 March 1993, no. 10, in *RRT Decr*., 11 (1993), p. 46; Decretum *c*. PINTO, 8 November 1996, nn. 6 and 8, in *RRT Decr*., 14 (1996), p. 224.

[252] Cf. RRT, Decretum *c*. DORAN, 19 May 1988, no. 14.2, in *RRT Decr*., 6 (1988), pp. 129-130.

[253] Cf. RRT, Decretum *c*. DEFILIPPI, 25 July 1997, no. 10, in *RRT Decr*., 15 (1997), pp. 175-176.

[254] Cf. RRT, Decretum *c*. DORAN, 19 May 1988, no. 14.2, in *RRT Decr*., 6 (1988), p. 130.

[255] Cf. RRT, Decretum *c*. DORAN, 18 May 1989, no. 9, in *RRT Decr*., 7 (1989), p. 92, where he is quoting the Signatura on this point.

[256] Cf. RRT, Decretum *c*. BOCCAFOLA, 25 July 1989, no. 17, in *RRT Decr*., 7 (1989), p. 147.

[257] Cf. RRT, Decretum *c*. COLAGIOVANNI, 11 December 1990, no. 9, in *RRT Decr*., 8 (1990), p. 199.

[258] Cf. RRT, Decretum *c*. DORAN, 2 February 1992, no. 7a, in *RRT Decr*., 10 (1992), p. 60

[259] Cf. RRT, Decretum *c*. GIANNECCHINI, 19 July 1991, no. 3, in *RRT Decr*., 9 (1991), p. 105; Decretum *c*. SERRANO RUIZ, 11 November 1991, no. 4, in *ibid*., p. 139.

These exceptional circumstances aside, in general it is legitimate for the judge to publish the acts to the parties through their legitimately designated procurators. In this regard, we read: "Certainly the tribunal fulfils the law in matrimonial processes if it indicates or communicates only to the advocate who is also a procurator those things which must be communicated to the parties and the advocate."[260] In fact, since the procurator is the party's *alter ego* within the process, if the party has a legitimately designated procurator, Rotal jurisprudence holds that it is sufficient for the judge to publish the acts to the procurator in place of the party.[261] By no means, though, does this deprive the party of the right to examine the acts personally.

As in other aspects of the process, the Roman Rota shows itself to abound in prudence and equity in the question of the publication of the acts, as has already been witnessed. The judge examining the alleged nullity of the sentence due to the non-publication of the acts should not be too formalistic. If a non-published act in no way formed a basis for the definitive sentence, the non-publication cannot be said to have amounted to a denial of the right of defence.[262] Also, when evidence from the petitioner was admitted after the publication of the acts (within the time when the parties could examine the acts), and the new evidence was not published, the respondent's right of defence is not denied if the respondent in fact never chose to inspect any of the acts.[263] The right of defence should not be said to be denied if the time period for inspecting the acts was rather brief, but the parties made no complaint against this, nor was there any evidence that they were denied the opportunity to inspect the acts.[264]

[260] RRT, Decretum *c*. PINTO, 22 October 1997, no. 5, in *RRT Decr*., 15 (1997), p. 205.

[261] Cf. RRT, Decretum *c*. BRUNO, 3 July 1987, no. 2a, prot. no. 14854, unpublished, no. 2c, pp. 4-5; Decretum *c*. FUNGHINI, 11 May 1994, no. 7, in *RRT Decr*., 12 (1994), pp. 94-95; Decretum *c*. STANKIEWICZ, 28 July 1994, no. 8, in *ibid*., p. 172; Decretum *c*. TURNATURI, 5 December 1996, no. 9, in *RRT Decr*., 14 (1996), p. 249; Decretum *c*. BOCCAFOLA, 21 October 1999, no. 11, in *RRT Decr*., 17 (1999), pp. 256-257; Decretum *c*. PINTO, 22 June 2001, B.Bis 79/01, no. 4, in FANELLI, *Relatio*-IV, p. 97; B. 24/08, "Relazione 2008," no. III.4, *cit*. (*vide supra* note 33), p. 44.

[262] Cf. RRT, Sententia definitiva *c*. DAVINO, 1 April 1976, no. 3, in *RRT Dec*., 68 (1976), pp. 161-162, cited in *RRT Decr*., 5 (1987), p. 126; RRT, Decretum *c*. DE LANVERSIN, 18 December 1986, no. 8, in *RRT Decr*., 4 (1986), pp. 180-181; Decretum *c*. COLAGIOVANNI, 29 March 1990, no. 10, in *RRT Decr*., 8 (1990), p. 78; B. 34/06, "Relazione 2006," no. III.4, *cit*. (*vide supra* note 55), p. 103; B. 105/06, "Relazione 2007," no. III.7, *cit*. (*vide supra* note 39), p. 82. This is true even if the sentence actually abundantly cited it, without in fact relying on it to reach its conclusion (cf. Decretum *c*. BOTTONE, 14 November 2002, B.Bis 87/02, no. 3, in FANELLI, *Relatio*-IV, p. 141).

[263] Cf. RRT, Decretum *c*. DAVINO, 14 December 1989, nn. 8-9, in *RRT Decr*., 7 (1989), p. 209.

[264] Cf. RRT, Sententia definitiva *c*. BOCCAFOLA, 27 February 1992, no. 6, in *RRT Dec*., 84 (1992), p. 94.

On several occasions, the defender of the bond of the superior tribunal notices some formal defects in the respect of the respondent's right of defence and proceeds to lodge a plaint of nullity. In some such cases, the silence of the respondent in the matter, however, may persuade the judge to consider that the respondent's right was not so much denied but voluntarily renounced. In one case, a Rotal *Turnus* challenged the Rotal defender for proposing a plaint of nullity due to a violation of the respondent's right of defence; for the alleged absence of serious causes for concealing some of the acts was not proven, nor was the respondent inclined to vindicate her rights. The defender should not be too eager to vindicate private rights, since his principal concerns pertain to the stability of the law and the public good.[265] Similarly, in another case in which the acts were not published to the respondent due to a founded risk of civil litigation, the party deemed herself aggrieved by the merits of the decision but not by any violation of her rights; the Rotal defender alleged the nullity of the sentence, but the respondent largely renounced the exercise of her rights before the first instance tribunal, and so the Rota determined that the respondent's right of defence was not truly denied.[266] This also happened in a case when the acts were not published to the respondent who, however, remitted herself to the justice of the tribunal, relied on her advocate, and made no complaints about violations of her rights.[267] In these situations, it can often be perceived that the respondent's free renunciation of procedural rights prevail in importance over the procedural irregularities pertaining to the publication of the acts.

5.1.7.3 — The Conclusion in the Cause

When the parties declare that they have no additional evidence to bring forward, when they neglect to bring forward additional evidence after the time limit established by the judge has passed, or when the judge has declared that the cause has been sufficiently instructed, the judge establishes the completion of the instructional phase, or the conclusion in the cause (*conclusio in causa*). Evidence that, as an exception, may be legitimately admitted after this moment is to be published.[268]

[265] Cf. RRT, Decretum SERRANO RUIZ, 22 January 1993, no. 5, in *RRT Decr.*, 10 (1992), pp. 4-5.

[266] Cf. RRT, Decretum *c.* COLAGIOVANNI, 30 March 1993, in *RRT Decr.*, 11 (1993), pp. 44-50.

[267] Cf. RRT, Decretum *c.* COLAGIOVANNI, 12 October 1993, no. 21, in *RRT Decr.*, 11 (1993), p. 151.

[268] Cf. *CIC* cc. 1599-1600; *CCEO* cc. 1282-1283; *DC* artt. 237-239.

The denial of the right of defence most commonly occurs at this moment in relationship to the *ius ad probationes* and the publication of the acts. Sometimes neither the decree publishing the acts nor the decree of the conclusion in the cause are ever communicated to a party, thus denying the right not only to view the acts but also to add to the evidence.[269] The same rights are denied when the conclusion in the cause is decreed on the same day as the publication of the acts.[270] In other situations, even if the publication of the acts legitimately occurs, the conclusion in the cause is illegitimately decreed in a way that denies the right of defence when it is established that available, relevant evidence is still to be obtained.[271] On the other hand, even if the conclusion in the cause is not legitimately communicated to the parties, the right of defence is not denied if it is established that the parties have no evidence to add.[272]

5.1.8 — *The Right of Defence in the Discussion Phase*

This phase of the trial typically consists of the presentation before the judge of written argumentation by the public parties involved and the private parties, who usually rely on their advocates for this task. It flows naturally from the instruction of the cause and especially the publication of the acts: for, now that all the parties are thoroughly apprised of the evidence brought forward, they are able to show the judge the way in which it may or may not support the allegations. If a party is insistent upon presenting his own arguments and the judge does not provide an adequate interval of time for this, the party's right of defence may be denied, causing the nullity of the sentence.[273] However, the party is obliged to do this within a legitimate time limit established by the judge; thus the judge may reasonably determine that, for example, one month is a sufficient period of time for the party to present his arguments.[274]

[269] Cf. RRT, Decretum *c*. GIANNECCHINI, 19 July 1991, nn. 3-4, in *RRT Decr*., 9 (1991), pp. 105-106.

[270] Cf. RRT, Decretum *c*. BURKE, 16 November 1989, no. 7, in *RRT Dec*., 81 (1989), p. 684.

[271] Cf. RRT, Decretum *c*. FUNGHINI, 20 May 1992, no. 8, in *RRT Decr*., 10 (1992), p. 99. However, there is no absolute right to present new evidence after the conclusion of the cause since, as a rule, this ends the period for bringing evidence forward; cf. SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Decretum definitivum *c*. VALLINI, no. 6, cited in GULLO-GULLO, *Prassi processuale*, *op.cit*. (*vide supra* note 7), p. 271, note 13.

[272] Cf. RRT, Decretum *c*. CIVILI, 5 May 1999, no. 9, in *RRT Decr*., 17 (1999), p. 109, citing a Decretum *c*. HUOT, 12 February 1982, B. 6/82, no. 8; Decretum *c*. HUBER, 10 July 2002, B.Bis 60/02, no. 5, in FANELLI, *Relatio*-IV, pp. 135-136.

[273] Cf. RRT, Decretum *c*. POMPEDDA, 19 October 1992, no. 7, in *RRT Decr*., 10 (1992), p. 183.

[274] Cf. RRT, Decretum *c*. BOCCAFOLA, 22 March 2001, B.Bis 29/01, no. 9, in FANELLI, *Relatio*-IV, p. 91.

Although the legislator prescribes an exchange of arguments and an opportunity to give responses (*CIC* c. 1603; *CCEO* c. 1286; *DC* artt. 242-243), the fundamental right at play in this stage is simply the right to present arguments.[275] Thus, when the tribunal fails to exchange the briefs or responses of the advocates and defender of the bond, the right of defence is not considered denied.[276]

Judicial experience regrettably reveals the inadequate preparation of argumentation, especially in the observations of the defender of the bond in causes of the nullity of marriage. As strenuously as this problem may need to be reproved in given tribunals, even by the intervention of the bishop moderator of the tribunal, it pertains to the proper *exercise* of the right of defence by the defender, not its denial by the judge. Thus, when the defender of the bond does not make a strong defence of the bond[277] or even acts in favour of the bond,[278] the sentence is not null due to the denial of the right of defence—though it may be quite vulnerable to reformation by the superior tribunal. Similarly, the passivity of an advocate during the discussion does not in itself constitute a denial of the right of the party's defence.[279]

Finally, it can sometimes happen during the discussion of the cause that a party or advocate may attach documents to his argumentation and the judge does not publish these documents. Unless the document truly introduces new evidence, the jurisprudence of the Roman Rota often considers

[275] Cf. RRT, Decretum *c*. GIANNECCHINI, 26 March 1987, nn. 3-4, in *RRT Decr*., 5 (1987), pp. 54-56; Decretum *c*. DAVINO, 22 December 1987, nn. 4-5, in *ibid*., pp. 126-127; Decretum *c*. FUNGHINI, 17 June 1992, no. 17, in *RRT Decr*., 10 (1992), pp. 136-137.

[276] Cf. RRT, Decretum *c*. DAVINO, 22 December 1987, no. 4, in *RRT Decr*., 5 (1987), p. 126; Decretum *c*. DE LANVERSIN, 15 June 1988, no. 3, in *RRT Decr*., 6 (1988), p. 146; Decretum *c*. GIANNECCHINI, 23 May 1989, no. 3, in *RRT Decr*., 7 (1989), p. 96; Decretum *c*. BOCCAFOLA, 22 March 2001, B.Bis 29/01, no. 9, in FANELLI, *Relatio*-IV, p. 91. The onus of promoting the written debate also rests upon the advocates (cf. Decretum *c*. GIANNECCHINI, 26 March 1987, no. 3, in *RRT Decr*., 5 [1987], pp. 54-55).

[277] Cf. RRT, Decretum *c*. BRUNO, 31 May 1985, no. 5, in *RRT Decr*., 3 (1985), p. 148; Decretum *c*. JARAWAN, 25 January 1989, no. 4, in *RRT Decr*., 7 (1989), p. 11 ("It is the role of the defender of the bond to protect the rights of the bond, not the rights of the party. But if the former is deficient in fulfiling his public function, his manner of proceeding does not redound unto a defect of the defence of the party"); Decretum *c*. BOCCAFOLA, 26 October 1989, no. 14, in *ibid*., pp. 175-176.

[278] Cf. RRT, Decretum *c*. CORSO, 17 October 1990, no. 4, in *RRT Decr*., 8 (1990), pp. 143-144; Sententia interlocutoria *c*. FUNGHINI, 29 November 1990, no. 10, in *RRT Dec*., 82 (1990), p. 830.

[279] Cf. B. 27/09, "Relazione 2009," no. III.4, *cit*. (*vide supra* note 60), p. 65. In this particular case, the advocate chose not to present a defence brief but rather reserved to himself the right to make a reply to the other arguments after requesting a copy of them from the tribunal.

documents attached to a defence brief to be strictly technical instruments presented in support of the arguments. Thus, their non-publication does not constitute a denial of the right of defence.[280]

5.1.9 — *The Right of Defence in the Decisional Phase*

Of its very nature, the decisional phase (*phase decisoria*) of the ordinary contentious process, in one respect, gives no occasion for a denial of the right of defence, since there is no *contradictorium* during its course. The *contradictorium* necessarily occurs prior to this stage, as has been described above: by way of the citation, the concordance of the doubts, the instruction, the publication of the acts, and the discussion of the cause. The decisional phase consists properly of the session of the college of judges, convened by decree of the presiding judge, during which the members of the college present their own conclusions reached *coram Deo* and decide by majority the dispositive part of the sentence and perhaps indicate what is to be included in the motivation (*CIC* c. 1609; *CCEO* c. 1292; *DC* art. 248). Within one month of this decisive judicial session, the definitive sentence is to be written and published (*CIC* c. 1610, §3; *CCEO* c. 1293, §3). Evidently, in the normal course of this phase, there is no presence or intervention of the parties, and so there are no rights to be denied.[281]

Nevertheless, a most significant moment pertaining to the right of defence occurs at the definitive completion of the instance, namely, the publication of the text of the definitive sentence (cf. *CIC* c. 1517). Indeed, once the text of the sentence has been written and signed by the judges and notary, it is to be published in accord with the norm of law. "Publication or notice of the sentence can be done by handing over a copy of the sentence to the parties or to their procurators or by sending the copy to them according to the norm

[280] Cf. RRT, Decretum *c*. PALESTRO, 18 June 1986, nn. 4-8, in *RRT Decr*., 4 (1986), pp. 96-97; Decretum *c*. DE LANVERSIN, 18 December 1986, no. 10, in *ibid*., p. 181; Sententia definitiva *c*. TURNATURI, 16 May 2002, no. 7, in *RRT Dec*., 94 (2002), p. 337; Decretum *c*. BOTTONE, 14 November 2002, B.Bis 87/02, no. 3, in FANELLI, *Relatio*-IV, p. 141; B. 63/09, "Relazione 2009," no. III.4, *cit*. (*vide supra* note 60), p. 64.

[281] There could, however, be errors related to the decisional phase, such as those pertaining to the execution of the sentence outside of causes of the nullity of marriage, which cannot ordinarily be executed after a single sentence. In a cause of rights, the first instance tribunal decreed the provisional execution of the sentence after an appeal had been made and without hearing the parties; this was a denial of their right of defence causing the irremediable nullity of the decree of execution (cf. RRT, Decretum *c*. PINTO, 8 May 1998, in *RRT Dec*., 90 [1998], pp. 369-374).

of canon 1509" (*CIC* c. 1615; cf. *CCEO* c. 1298).[282] In addition, within the sentence itself, the parties are to be explicitly informed of the methods by which it can be challenged, as well as the time limits for doing so; "it does not have any force prior to the publication" (*CIC* c. 1614; cf. *CCEO* c. 1297).[283]

The judge's failure to publish the sentence by conveying a complete copy to the private and public parties can lead to a denial of the right of defence. The non-publication of the sentence itself does not make the same sentence invalid; as was noted, this defect causes, rather, the inefficacy of the sentence. The publication of the sentence is a passive moment in the process, pertaining to the "right to information," to use the expression of Stankiewicz quoted above. When this right to information is respected, it is then possible for the party to become active by exercising the "right to a hearing." What form does the right to a hearing take after the publication of the definitive sentence? The party is heard when he exercises the *ius impugnandi*—the right to challenge the sentence, especially to appeal it (*ius appellandi*). It is in this sense that "the publication of the sentence pertains to the essence of the right of defence."[284] If the party cannot challenge the sentence due to its non-publication, the process is, in essence, suspended due to the inefficacy of the sentence. As a rule, therefore, it is not possible for the cause to proceed to the next level of jurisdiction; if the superior tribunal attempts to do so, however, "each successive procedural act is null."[285] "Above all, the defect of communication of the sentence to the respondent invalidates the procedural acts of the appellate tribunal, since the first instance sentence constitutes the object of the subsequent process …."[286]

Most commonly, in causes of the nullity of marriage, when the first instance sentence declaring the nullity of marriage is never properly published to the parties, the tribunal wrongly transmits the cause to the second instance tribunal for the *processus brevior*, since the sentence remains still ineffective.

[282] Can. 1615—Publicatio seu intimatio sententiæ fieri potest vel tradendo exemplar sententiæ partibus aut earum procuratoribus, vel eisdem transmittendo idem exemplar ad normam can. 1509.

[283] Can. 1614—Sententia quam primum publicetur, indicatis modis quibus impugnari potest; neque ante publicationem vim ullam habet, etiamsi dispositiva pars, iudice permittente, partibus significata sit.

[284] RRT, Decretum *c*. FALTIN, 12 June 1990, no. 7, in *RRT Decr*., 8 (1990), p. 109. Cf. also, Sententia definitiva *c*. STANKIEWICZ, 20 July 1995, no. 8, in *RRT Dec*., 87 (1995), p. 506; cf. "Relazione 2000," no. III.4, p. 189.

[285] RRT, Decretum *c*. MONIER, 12 May 2000, B.Bis 53/00, in FANELLI, *Relatio*-IV, p. 60.

[286] RRT, Decretum *c*. MONIER, 22 February 2002, B.Bis 13/02, no. 5, in FANELLI, *Relatio*-IV, p. 117; Decretum *c*. HUBER, 10 July 2002, B.Bis 60/02, no. 6, in *ibid*., p. 136.

In proceeding to issue a decree of confirmation, therefore, the second instance tribunal acts invalidly; for the respondent and the defender of the bond never have the practical opportunity to appeal the sentence. Thus, their right of defence, understood here as the *ius appellandi*, is denied, causing the irremediable nullity of the decree of confirmation.[287] In one cause, the respondent was not informed of the content of the sentence, and yet the cause was transmitted to the ordinary appellate tribunal, which confirmed the sentence. Only then was the party informed of the content of the sentence; after that she appealed the affirmative sentence to the Rota, which not only upheld her right of appeal but also declared the nullity of the decree of confirmation—as well as the affirmative sentence, for additional reasons.[288]

Nevertheless, the non-publication of the definitive sentence according to the precise norm of law does not always cause subsequent acts and decisions to be invalid. In the first place, if the party to whom the sentence was not published appeals against it and pursues the appeal, he has "renounced his right to the publication of the sentence."[289] It may also happen that the publication of the sentence *in forma familiari*—that is, notification of the dispositive part with an indication of how to appeal and an invitation to

[287] Cf., e.g., RRT, Decretum *c*. BOCCAFOLA, 25 July 1989, no. 19, in *RRT Decr*., 7 (1989), p. 149; Decretum *c*. FALTIN, 12 June 1990, no. 9, in *RRT Decr*., 8 (1990), p. 110; Sententia interlocutoria *c*. FUNGHINI, 29 November 1990, no. 12, in *RRT Dec*., 82 (1990), p. 831; Decretum *c*. RAGNI, 13 December 1990, no. 7, in *RRT Decr*., 8 (1990), p. 216; Decretum *c*. BOCCAFOLA, 17 October 1991, no. 14, in *RRT Decr*., 9 (1991), p. 133; Decretum *c*. BOCCAFOLA, 4 February 1993, no. 15, in *RRT Decr*., 11 (1993), p. 23; Decretum *c*. STANKIEWICZ, 27 May 1994, nn. 25-26, in *RRT Decr*., 12 (1994), p. 127; Sententia definitiva *c*. STANKIEWICZ, 20 July 1995, no. 20, in *RRT Dec*., 87 (1995), p. 512; Decretum *c*. STANKIEWICZ, 29 March 1996, no. 13, in *RRT Decr*., 14 (1996), p. 72; Decretum *c*. MONIER, 22 February 2002, B.Bis 13/02, no. 5, in FANELLI, *Relatio*-IV, p. 117; B. 17/09, "Relazione 2009," no. III.4, *cit*. (*vide supra* note 60), p. 67; B. 140/08, *ibid*., p. 68.
Cf. Joseph PUNDERSON, "Canons 1620, 7°, 1621 and 1627. Complaint of Nullity Due to Denial of Right of Defense in Second Instance and Suspension of Execution of a Confirmatory Decree," in Arthur J. ESPELAGE (ed.), *CLSA Advisory Opinions 1994—2000*, Washington, DC, CLSA, 2002, pp. 491-492; *Roman Replies and CLSA Advisory Opinions 1996*, Washington, DC, CLSA, 1996, pp. 120-122.

[288] Cf. RRT, Decretum *c*. BOCCAFOLA, 13 January 1988, in *RRT Decr*., 6 (1988), pp. 6-11, esp. at no. 8, pp. 7-8. See also, e.g., Decretum *c*. RAGNI, 13 December 1990, in *RRT Decr*., 8 (1990), p. 216.

[289] RRT, Decretum *c*. STANKIEWICZ, 26 October 1990, no. 10, in *RRT Decr*., 8 (1990), p. 159. This is another application of the principle of the conservation of acts, which has been received into legislation; cf., e.g., BENEDICT XVI, Litteræ Apostolicæ motu proprio datæ *Antiqua ordinatione* quibus Supremi Tribunalis Signaturæ Apostolicæ *Lex propria* promulgatur, 21 June 2008, art. 52, §1, in *AAS*, 100 (2008), p. 525, according to which the subsequent appeal of a party against a Rotal decision sanates its nullity arising from the defect of a legitimate mandate.

examine the sentence at the tribunal—in a particular case may accomplish the same end as the transmission of the text of the sentence.[290] Another practice, too, substantially respects the right of appeal. In one tribunal, while a copy of the sentence was not given to the respondent, the dispositive portion of the sentence was sent to him; and a week and a half later the adjutant judicial vicar met with him at the tribunal, reading and fully explaining the sentence to him; he noted the party's concerns and objections, which were to be forwarded to the appellate tribunal, and informed him of the ways he could challenge the sentence and before which tribunals.[291]

Other complaints that can be made against the definitive sentence do not amount to a denial of the right of defence but may rather be the object of an appeal. This occurs, for example, when the judge's evaluation of the proofs is deemed faulty.[292] When documents submitted by a party as proof are not mentioned in the definitive sentence, the right of defence is not denied since this does not prove that they were not in the acts.[293] Also, the right of defence is not denied when the sentence decides a ground not named in the formula of the doubt, if the ground named was inclusive of the extra ground—for example, a scenario of *dolus* which included the unnamed ground of partial simulation *contra bonum fidei*.[294]

5.1.10 — *Error in the Use of the* processus brevior

The misuse of the *processus brevior* resulting in the irremediable nullity of the sentence due to the tribunal's absolute incompetence was explored

[290] Cf. RRT, Decretum *c*. TURNATURI, 14 July 1995, no. 38, in *RRT Decr*., 13 (1995), p. 94. This would constitute the bear minimum: "Tribunal conventæ saltem significare debuisset exemplar sententiæ perlegi posse ac præsto esse penes cancellariam tribunalis" (Sententia interlocutoria *c*. FUNGHINI, 29 November 1990, no. 12, in *RRT Dec*., 82 [1990], p. 831).

[291] Cf. RRT, Decretum *c*. RAGNI, 26 October 1993, nn. 8-13, in *RRT Decr*., 11 (1993), pp. 176-181.

[292] Cf. RRT, Decretum *c*. STANKIEWICZ, 29 November 1995, no. 12, in *RRT Decr*., 13 (1995), pp. 157-158: "Therefore, the right of defence, which the parties have in the canonical process, cannot be violated by the free evaluation of evidence, which the judge enjoys according to the norm of law: 'He who uses his right harms no one.' […] If the petitioner deems himself aggrieved by the evaluation of the evidence in the sentence …, he can explain such a grievance among the motives for an appeal by requesting the overturning of the sentence (cc. 1628; 1634, §1), but not the declaration of its nullity due to the denial of the right of defence."

[293] Cf. RRT, Sententia interlocutoria *c*. RAGNI, 11 June 1985, no. 9, in *RRT Decr*., 3 (1985), p. 160.

[294] Cf. RRT, Decretum *c*. FALTIN, 22 January 1992, nn. 11, 12, in *RRT Decr*., 10 (1992), pp. 4-5. On this possibilty as well as the due caution to be taken in concrete cases lest the right of defence be denied, cf. MONETA, "Determination of the Formulation of the Doubt," *op.cit*. (*vide supra* note 104), pp. 97-100.

above (see section 2.1.4). This problem can also be framed in terms of the parties' right of defence. While there is no *contradictorium* instituted before the appellate tribunal deciding whether or not to confirm the affirmative sentence—that is, no new evidence may be presented or published, and there is no discussion among the parties—the parties have a right to make observations about the affirmative sentence before the superior tribunal prior to the decision.[295] Indeed, the legislator says that the superior judges are first to weigh the observations of the defender of the bond and, if there are any, of the parties (*perpensis animadversionibus defensoris vinculi et, si quæ sint, etiam partium*). The non-observance of this requirement does not itself cause the nullity of the decree of confirmation.[296] However, this coupled with the non-publication of the affirmative sentence does amount to the denial of the parties' right of defence and thus the irremediable nullity of the decree of confirmation, since a double conforming decision is thus issued without the respondent ever knowing the motivations for this or having the right to appeal the affirmative sentence.[297]

Among the legitimate ways of challenging an affirmative sentence declaring the nullity of marriage is the plaint of nullity. When a plaint of nullity is proposed together with an appeal, it is illegitimate for the appellate tribunal to decide the merits of the case without first resolving the plaint of nullity—a question prejudicial to the confirmation of the sentence. It is in

[295] Accordingly, the non-admission of evidence before the appellate tribunal prior to the confirmation or not of the sentence does not constitute a denial of the right of defence (cf. RRT, Decretum *c.* SCIACCA, 20 July 2001, B.Bis 99/01, no. 4, in FANELLI, *Relatio*-IV, p. 101).

[296] "Nullibi tamen in can. 1682, § 2, statuitur ut iudex exquirat eiusmodi animadversiones, ideoque eo minus sub pœna nullitatis: tantum statuitur ut iudex, præter animadversiones vinculi Defensoris, perpendat quoque animadversiones partium, 'si quæ sint'" (RRT, Sententia definitiva *c.* DEFILIPPI, 27 November 1998, no. 5a, in *RRT Dec.*, 90 [1998], p. 790). Cf. also Decretum *c.* MONIER, 27 June 1997, nn. 3 and 7, in *RRT Decr.*, 15 (1997), pp. 119, 120-121.

[297] After the respondent in one case received only a notice about the transmission of the cause to the second instance tribunal, but no copy of the sentence, the decree of confirmation later issued was declared null, but not the affirmative sentence; for she "nec … certior facta est de decisione illa in sede ferenda ac iure intra definitum tempus animadversiones exhibendi. Defensionis iure, ergo, privata est" (RRT, Sententia interlocutoria *c.* FUNGHINI, 29 November 1990, no. 12, in *RRT Dec.*, 82 [1990], p. 831). In another case, neither the first instance sentence in the case nor, earlier, the decrees of publication and conclusion were duly communicated to the respondent; this led the Rota to state that the decree of confirmation suffered from derived nullity. Nevertheless, due to these procedural defects at the appellate tribunal, the Rota continues: "Ideo cum non constet de ulla alia notitia Conventæ data, ad abundantium dici potest, quod sine dubio decretum confirmatorium irritum sit etiam nullitate originaria ob denegatum Conventæ ius defensionis" (RRT, Decretum *c.* ERLEBACH, 7 May 1998, no. 11, in *RRT Decr.*, 16 [1998], p. 134).

fact the Roman Rota's own prevailing practice to decide the question of the nullity of the sentence preliminarily to the question of the confirmation of the sentence—whether in the same judicial session and decree, or separately.[298] One second instance tribunal proceeded to confirm the first instance affirmative decision without regard for the respondent's plaint of nullity against the first instance sentence. The party claimed that his right of defence was denied by the first instance tribunal; while it in fact was not, it was subsequently denied by the second instance tribunal when it failed to address his plaint of nullity.[299]

We alluded above to an erroneous application of the *processus brevior* after a negative sentence is issued in first instance. The appellate tribunal denies the parties' right of defence if it proceeds to issue a "decree of confirmation" of the negative sentence. Such a decree is irremediably null since it is issued without instituting a proper *contradictorium*, which must be done by way of the ordinary contentious process.[300]

Related to this is the problem of the immediate issuance of a negative sentence after an affirmative sentence is issued in first instance without observing canon 1682, §2 (*CCEO* c. 1368, §2). Since the error in this situation pertains to the defect of an appellate process, it will be discussed in the next section.

5.1.11 — *Denial of the Right of Defence in the Appellate Process*

In principle, the appellate tribunal should ordinarily be able to conduct a simpler process than was carried out before the first instance tribunal. Since

[298] Cf., e.g., RRT, Decretum *c.* PALESTRO, 18 June 1986, no. 2, in *RRT Decr.*, 4 (1986), pp. 94-95; Decretum *c.* DORAN, 3 May 1990, no. 4, in *RRT Decr.*, 8 (1990), p. 91; Decretum *c.* BURKE, 15 November 1990, no. 3, in *ibid.*, p. 170; Sententia interlocutoria *c.* BRUNO, 5 February 1992, in *RRT Dec.*, 84 (1992), pp. 37-48; Decretum *c.* POMPEDDA, 19 October 1992, in *RRT Decr.*, 10 (1992), pp. 182-184; Decretum *c.* JARAWAN, 28 May 1993, no. 1, in *RRT Decr.*, 11 (1993), p. 125; Decretum *c.* FALTIN, 18 May 1994, no. 5, in *RRT Decr.*, 12 (1994), p. 103; Decretum *c.* STANKIEWICZ, 28 July 1994, no. 5, in *ibid.*, p. 171; Decretum *c.* BOCCAFOLA, 25 January 1996, in *RRT Decr.*, 14 (1996), pp. 17-20; Decretum *c.* DE LANVERSIN, 5 June 1996, no. 9, in *ibid.*, p. 96; Decretum *c.* SERRANO RUIZ, 7 June 1996, no. 5, in *ibid.*, p. 104; Decretum *c.* DEFILIPPI, 14 May 1998, no. 1, in *RRT Decr.*, 16 (1998), p. 143; Decretum *c.* CABERLETTI, 26 June 1998, in *ibid.*, pp. 226-235; Decretum *c.* HUBER, 1 December 1998, no. 2, in *ibid.*, p. 363.

[299] Cf. RRT, Decretum *c.* AGUSTONI, 7 November 1986, nn. 9-13, in *RRT Decr.*, 4 (1986), pp. 173-174.

[300] Cf., e.g., RRT, Decretum *c.* JARAWAN, 26 July 1996, no. 3, in *RRT Decr.*, 14 (1996), pp. 180-181; Decretum *c.* CIVILI, 9 July 1997, no. 6, in *RRT Decr.*, 15 (1997), p. 134.

it is most suitable, and usually most convenient, that the first instance tribunal complete the instruction of the cause—which, in any case, it is obliged to do in a thorough manner—there may often be no need for the appellate tribunal to supplement the instruction (cf. *CIC* c. 1640; *CCEO* c. 1321; *DC* art. 267, §2). The legislator himself foresees that the appellate process will take about half as long as the first instance process (*CIC* c. 1453; *CCEO* c. 1111).[301] These dynamics, clear in themselves, may have led some appellate tribunals into confusion about how to conduct a proper appellate process. It may also be the frequent use of the *processus brevior* that has led some appellate tribunals ineptly to appreciate the nature of their task. Errors in the appellate process, though, are not minor; they not uncommonly amount to a denial of the right of defence before the appellate tribunal.

> Therefore, the omission of procedural laws entails a violation of the right of defence in the procedure used (*in procedendo*) and a denial of the right of defence in the substance of the decision (*in decernendo*) in the cases prescribed by law, namely, whenever a prescript of law has been neglected as in the case of a defect of the calling of the parties to trial, the publication of the acts, of the sentence, and so forth. These norms are also valid at the level of appeal in which "it is necessary to proceed in the same manner as in first instance, with the appropriate adjustments …." (cf. c. 1640).[302]

As was just alluded to above, the irremediable nullity of the sentence due to the denial of the right of defence often results from the appellate tribunal's omission of the *processus brevior*. In these situations, upon receiving the affirmative sentence and acts of the cause from the lower tribunal, the appellate tribunal chooses not to decide whether to confirm the sentence or admit the cause to an ordinary process, but rather immediately issues a negative sentence. This is a clear procedural error, since the only options available to the appellate tribunal vis-à-vis the merits of the cause are to confirm the sentence or not; if it finds that it would be inclined to issue a negative sentence, it must admit the cause to an ordinary process, cite the parties, establish the formula of the doubt and, if no additional instruction is needed, hold the discussion and issue a decision. The immediate reformation of the affirmative sentence by issuing a negative definitive sentence denies the parties' right of defence, since they are

[301] Notwithstanding the adage "justice delayed is justice denied," we note in passing that the excessive length of the process due to the tribunal's inactivity does not in itself constitute a denial of the right of defence (cf. RRT, Decretum *c.* CIVILI, 13 March 1991, no. 5, in *RRT Decr.*, 9 [1991], p. 37).

[302] RRT, Sententia definitiva *c.* FALTIN, 20 November 1991, no. 14, in *RRT Dec.*, 83 (1991), p. 741.

entirely deprived of the opportunity to propose additional evidence and present new arguments.[303]

The situation is no better when the tribunal admits the cause to an ordinary examination but then fails to carry out the appellate process. Two days after one cause was admitted to an ordinary examination, it was decided in the negative without the observance of the ordinary contentious process. This sentence was described as "a unilateral sentence issued by the judges without a procedural relationship being established with the parties in the cause."[304] The decree admitting the cause to an ordinary examination should typically identify the defects in the first instance instruction that prevent the confirmation of the sentence; when this is done it is incumbent upon the appellate tribunal to help supply these lacunæ during the appellate instruction, or at least give the parties a realistic opportunity to do so. One tribunal, however, completed no instruction but proceeded to issue a negative sentence two days after the concordance of the doubts.[305]

[303] Cf., e.g., RRT, Decretum *c*. STANKIEWICZ, 13 December 1990, nn. 4-8, in *RRT Dec*., 82 (1990), pp. 848-851; Sententia interlocutoria *c*. FALTIN, 20 November 1991, nn. 20-22, in *RRT Dec*., 83 (1991), pp. 744-745; Decretum *c*. BRUNO, 28 February 1992, no. 6, in *RRT Decr*., 10 (1992), p. 25; Decretum *c*. BRUNO, 23 April 1993, no. 6, in *RRT Decr*., 11 (1993), p. 67; Decretum *c*. FUNGHINI, 6 November 1996, nn. 7-8, in *RRT Decr*., 14 (1996), pp. 209-210; Decretum *c*. PINTO, 8 November 1996, no. 9, in *ibid*., pp. 224-225; Decretum *c*. LÓPEZ-ILLANA, 18 February 1998, no. 10, in *RRT Decr*., 16 (1998), p. 37, *et passim*; Decretum *c*. ALAWAN, 12 October 1999, nn. 7 and 9, in *RRT Decr*., 17 (1999), pp. 228-229; Decretum *c*. CIVILI, 5 May 1999, no. 12, in *ibid*., pp. 109-110; Decretum *c*. ALWAN, 12 October 1999, nn. 8-13, in *ibid*., pp. 228-229; Decretum *c*. ALWAN, 20 June 2000, B.Bis 65/00, nn. 12-13, in FANELLI, *Relatio*-IV, pp. 62-63; Decretum *c*. MONIER, 20 July 2001, B.Bis 98/01, no. 7, in *ibid*., p. 100; Decretum *c*. MONIER, 22 February 2002, B.Bis 13/02, no. 7, in *ibid*., p. 117; Decretum *c*. MONIER, 27 November 2009, in *SCL*, 6 (2010), pp. 397-401; B. 101/06, "Relazione 2007," no. III.7, *cit*. (*vide supra* note 39), p. 83 (the decision in this case, calling itself a decree of "non-confirmation," was termed by the Rotal *Turnus* a "juridical wonder" [*monstrum iuridicum*]); B. 128/08, "Relazione 2009," no. III.4, *cit*. (*vide supra* note 60), p. 66. See also the following unpublished decrees cited by Augustine MENDONÇA, "Irremediable Nullity of a Negative Sentence in Second Instance," in *Studies in Church Law*, 5 (2009), pp. 506-510: Decretum *c*. AROKIARAJ, 28 May 2009, nn. 4 and 7, B.Bis 73/09; Decretum *c*. ARELLANO CEDILLO, 17 April 2008, no. 5, B. 49/08; Decretum *c*. FERREIRA PENA, 7 March 2008, no. 6, B. 32/08; Decretum *c*. SCIACCA, 30 November 2007, no. 22, B.141/07; Decretum *c*. YAACOUB, 9 November 2007, no. 8, B. 126/07; Decretum *c*. VERGINELLI, 13 July 2007, no. 6, B.Bis 92/07.
In one case, the *Ponens* highlighted the defect in motivation (c. 1622, 2º) as the cause of the nullity of the sentence (Decretum *c*. BRUNO, 25 November 1994, no. 7, in *RRT Decr*., 12 [1994], pp. 189-190).

[304] RRT, Decretum *c*. PALESTRO, 3 July 1991, no. 7, in *RRT Decr*., 9 (1991), p. 96.

[305] Cf. RRT, Decretum *c*. BOCCAFOLA, 2 April 1992, no. 7, in *RRT Decr*., 10 (1992), p. 56.

This serious defect of the appellate process is to be kept distinct from other possible omissions in the context of the *processus brevior* and the appellate process. For instance, the absence of the decree admitting the cause to an ordinary examination in itself causes the remediable nullity of the sentence since the latter is based on an invalid act (*CIC* c. 1622, 5º; *CCEO* c. 1304, §, 5º); if the rights of the parties are subsequently observed during the appellate process, though, the right of defence is not denied.[306]

Mirroring the discussion above in the sections 5.1.2-3, the denial of the right of defence, the denial of the right of defence in the appellate process may occur for manifold reasons, such that at times it could even be said that there was virtually no process at all. In one appellate tribunal, almost every significant procedural moment was simply omitted: there was no citation, intervention of the defender of the bond, concordance of the doubts, publication of acts, conclusion in the cause, discussion of the cause, or motivation of the sentence. This led the Rotal *Turnus* to declare: "In the cause before Us, it indeed would not suffice to assert that the judicial process in second instance was only inadequate; for it should rather be called almost inexistent. […] Practically speaking, no real process took place in second instance."[307]

Likewise, the respondent's right of defence may be singularly denied during the appellate process, thus causing the irremediable nullity of the appellate sentence.[308] This may be due to the prejudice or neglect of the

[306] "Neglectus vero præscripti can. 1682, § 2, non eiusdem est gravitatis [ac omissio citationis actorumque publicationis], quia hæc norma etsi imperativa et ab omnibus tribunalibus appellationis, Apostolico Romanæ Rotæ Tribunali incluso (cf. art. 58, NRRT), adhibenda post decisionem affirmativam in prima instantia datam, tamen condicionem iuridicam non exprimit, quæ a can. 10 exigitur pro legibus inhabilitantibus. Utcumque agitur de nullo decreto, etsi nullitate sanabili" (RRT, Decretum *c*. PINTO, 22 October 1997, no. 7, in *RRT Decr*., 15 [1997], p. 206). Cf. also Decretum *c*. FUNGHINI, 12 June 1991, nn. 2 and 4-6, in *RRT Decr*., 9 (1991), pp. 81-83; Decretum *c*. BRUNO, 28 February 1992, no. 6, in *RRT Decr*., 10 (1992), p. 25. However, it has also been argued that the failure to issue a decree admitting the cause to an ordinary examination itself constitutes a denial of the right of defence redounding to the irremediable nullity of the sentence; cf., e.g., Decretum *c*. LÓPEZ-ILLANA, 18 February 1998, no. 7b, in *RRT Decr*., 16 (1998), p. 35.

[307] RRT, Decretum *c*. BURKE, 17 July 1997, nn. 5 and 8, in *RRT Decr*., 15 (1997), p. 142. For other examples of this, cf., e.g., Decretum *c*. DE LANVERSIN, 23 November 1988, no. 7, in *RRT Decr*., 6 (1988), p. 223; Decretum *c*. BURKE, 18 October 1990, nn. 6-8, in *RRT Decr*., 8 (1990), pp. 148-149; Decretum *c*. SERRANO RUIZ, 21 February 1997, no. 2, in *RRT Decr*., 15 (1997), p. 43; Decretum *c*. PINTO, 22 October 1997, no. 7, in *ibid*., p. 206; Decretum *c*. SABLE, 24 May 1999, no. 6, in *RRT Decr*., 17 (1999), p. 147: "Nullitas sententiæ secundi gradus manifeste apparet, quia … totaliter deest processus iudicialis in secundo iudicii gradu …."; Decretum *c*. TURNATURI, 4 July 2002, B.Bis 59/02, in FANELLI, *Relatio*-IV, pp. 134-135.

[308] Cf., e.g., RRT, Decretum *c*. FALTIN, 3 March 1994, nn. 13-14, in *RRT Decr*., 12 (1994), pp. 24-25; B. 20/07, "Relazione 2007," no. III.7, *cit*. (*vide supra* note 39), p. 83.

appellate tribunal, or it may be because the appellate tribunal maintained that the decree of absence issued by the first instance judge was still in effect at the second level of jurisdiction, thus respecting none of the party's rights in the appellate process.[309] As a new trial, all of the procedural norms governing the ordinary contentious process are to be observed by the appellate tribunal independently of the previous trial, without prejudice to the principle of the connection of causes. Included within this is the right to present new evidence; the denial of this right even at the appellate level causes the irremediable nullity of the sentence.[310]

5.2 — A Sentence Based on a Null Judicial Act

Another defect in the process that can cause the nullity of the sentence is what is called *derived nullity*, which was also discussed more generally above in Section One. Here it is a question of the nullity of a judicial act placed within the process resolved by definitive sentence; the nullity of that act, since the definitive sentence is in some sense based on it, causes the remediable nullity of the sentence. Many examples of this could be envisioned, for instance, a citation that is null because it was not sent to the respondent (c. 1511) or does not specify the object of the trial or elicit the response of the respondent,[311] the above-discussed example of the publication of the acts only to the advocates and not to the parties,[312] when an act is not published to the parties and their advocates but is known to them in some other way,[313] the absence of a notary from the process,[314] a null decree admitting the cause to an ordinary examination,[315] and a decree of confirmation of a sentence declaring the nullity of marriage issued after a previous decree of confirmation was invalidly declared null.[316]

[309] Cf. RRT, B. 124/07, "Relazione 2008," no. III.4, *cit.* (*vide supra* note 33), p. 47.
[310] Cf. RRT, B. 129/07, "Relazione 2008," no. III.4, *cit.* (*vide supra* note 33), p. 46.
[311] Cf. RRT, Decretum *c.* STANKIEWICZ, 27 February 1992, no. 3, in *RRT Decr.*, 10 (1992), p. 19.
[312] Cf. RRT, Decretum *c.* STANKIEWICZ, 28 July 1994, no. 13, in *RRT Decr.*, 12 (1994), p. 173; Decretum *c.* BOCCAFOLA, 26 October 1995, no. 7, in *RRT Decr.*, 13 (1995), p. 124.
[313] Cf. RRT, Decretum *c.* STANKIEWICZ, 26 October 1990, no. 14, in *RRT Decr.*, 8 (1990), p. 161.
[314] Cf. RRT, Sententia interlocutoria *c.* STANKIEWICZ, 31 January 1989, nn. 5-6, in *RRT Dec.*, 81 (1989), pp. 93-95.
[315] Cf. RRT, Decretum *c.* DE LANVERSIN, 23 November 1988, no. 7, in *RRT Decr.*, 6 (1988), p. 222.
[316] Cf. RRT, Decretum *c.* AROKIARAJ, 28 May 2010, no. 7, B.Bis 80/2010, in *StC*, 46 (2012), p. 257.

5.3 — The Illegitimate Use of the Documentary Process

This defect in the process is quite specific but is worth the attention of both practitioners and scholars. For it seems to constitute another motive for declaring the irremediable nullity of the definitive sentence.[317] The documentary process is to be used when a document subject to no exception establishes that a marriage is invalid due to the presence of a diriment impediment or the defect of canonical form (*CIC* c. 1686; *CCEO* c. 1372, §1; *DC* art. 295). If the marriage is declared null when these essential presuppositions for using the process are absent, the affirmative sentence is irremediably null.

Prior to the promulgation of the Eastern Code (viz., in the 1950s), an Eastern Catholic defected from the Catholic Church and attempted marriage with an Orthodox Christian before an Orthodox priest. She divorced and attempted a second marriage. The second marriage, too, ended, and the tribunal, which was approached in 1995, considered the first marriage valid (according to the law of the current Eastern Code, canon 834, §2) and declared the second marriage invalid due to the impediment of prior bond. In fact, the first marriage was manifestly invalid, since canonical form was required for validity at the time of the wedding (*Crebræ allatæ*, canon 90, §1; *tempus regit actum*); and the documentary process could not be validly used to examine the alleged nullity of the second marriage. Thus, the sentence was declared irremediably null *ob illegitime adhibitum processum documentalem*.[318]

6 — *Nullifying Defects in the Sentence Itself*

Can. 1620 — A sentence suffers from the defect of irremediable nullity, if: […]
8º—the controversy was not even partially decided.

Can. 1622 — A sentence only suffers from the defect of remediable nullity, if: […]
2º—it does not contain the motives or reasons for deciding;
3º—it lacks the signatures prescribed by law;

[317] On the other hand, the limitation of the use of this process might reasonably be considered to cause the absolute incompetence of the judge when it is illegitimately employed; cf. STANKIEWICZ, "Chapter I. The Plaint of Nullity of the Judgement," in *op.cit*. (*vide supra* note 1), p. 1545.

[318] Cf. RRT, Decretum *c*. POMPEDDA, 6 March 1998, in *RRT Decr*., 16 (1998), pp. 76-79. This decision was appealed to a higher *Turnus* which, however, confirmed the decree; see Decretum *c*. ERLEBACH, 12 May 2000, nn. 13-14, in *IE*, 14 (2002), pp. 692-694.

> 4º—it does not make an indication of the year, month, day and place in which it was issued; […].[319]

The defects of irremediable and remediable nullity discussed above cause the extrinsic nullity of the sentence. Its nullity is caused by something outside of itself, and its nullity is therefore derived from the invalid act and consequences flowing therefrom. In this final section, we address the intrinsic nullity of the sentence: those defects originating from and residing within the sentence itself, causing it to be irremediably or remediably null. No examples of the defect of canon 1622, 4º (*CCEO* c. 1304, §1, 4º) were discovered in Rotal jurisprudence, and so it will not be discussed.

6.1 — The Sentence Does Not Even Partially Decide the Controversy

As is evident from the foregoing, the whole judicial process is oriented toward the authoritative pronouncement of the judge called the definitive sentence. This is because it displays the judge's definitive, juridically efficacious reply to the formula of the doubt; this is the very essence of the definitive sentence. When the sentence does not do this—giving no resolution to any of the doubts posed, but rather deciding *ultra et extra petita*—it substantially violates its own nature and is irremediably null. This is a question of natural justice, since parties who legitimately approach or are summoned to appear before the judge have a right to know his definitive decision about the object of the trial.

The simplest form of this defect is when the sentence only issues a decision on a ground that was never established in the formula of the doubt. Among the examples to be found in causes of the nullity of marriage are the following: the sentence decided the ground of total simulation, while the grounds were force or grave fear and simulation *contra bonum sacramenti*;[320] the sentence decided the ground of canon 1095, 3º, while the doubt agreed upon pertained to canon 1095, 2º;[321] the sentence decided total simulation, while the grounds were grave defect of discretion of judgement, defect of internal freedom, and partial simulation *contra*

[319] Can. 1620 — Sententia vitio insanabilis nullitatis laborat, si: […] 8º controversia ne ex parte quidem definita est. Can. 1622 — Sententia vitio sanabilis nullitatis dumtaxat laborat, si: […] 2º motiva seu rationes decidendi non continet; 3º subscriptionibus caret iure præscriptis; 4º non refert indicationem anni, mensis, diei et loci in quo prolata fuit; […].

[320] Cf. RRT, Decretum *c*. STANKIEWICZ, 4 June 1980, cited in *RRT Decr*., 2 (1984), p. 91 (no. 1).

[321] Cf. RRT, Decretum *c*. BURKE, 4 May 1988, in *RRT Decr*., 6 (1988), pp. 100-102. The inverse occurred in a sentence declared null by a Decretum *c*. STANKIEWICZ, 27 November 2003, B.Bis 119/03, in FANELLI, *Relatio*-IV, pp. 173-174.

bonum prolis;[322] the sentence decided solely the ground of total simulation, while the proper grounds were partial simulation *contra bona sacramenti et prolis*.[323] This also occurs when the appellate tribunal mistakenly confirms an affirmative sentence declaring the nullity of marriage on a ground decided in the negative; for the question to be answered by the decree of confirmation is whether the sentence is to be confirmed with respect to the ground decided in the affirmative.[324]

This defect also occurs when the formula of the doubt never specifies to which party the one stated ground applies, and the sentence never clarifies this: "It is unseemly and rights are injured if parties must only guess or predict what are the alleged grounds of the arguments to which they are compelled to respond in order to exercise their defence, while the judges remain silent!"[325] In one cause of marriage nullity, it was not clear upon what specific ground or party the dispositive portion of the sentence was based. The formula of the doubt was simply grave defect of discretion of judgment (c. 1095, 2º) without a specification of the party or parties to which it applied. The body of the sentence consisted of a summary and unclear description of the statements in the acts, with the conclusion, "Affirmative" and the imposition of a *vetitum*. Never was there any indication of which party was incapable, nor could this be logically deduced from the motivation of the sentence.[326]

Beyond the defect of a judicial petition and the denial of the right of defence, another serious problem that can arise from the judge's *ex officio* modification of the formula of the doubt is the issuance of a sentence that does not even partially decide the controversy. If the terms of the controversy are changed *ex officio* and unbeknownst to the parties, and the sentence addresses only the new grounds, the sentence is null for this reason.[327] For the grounds originally agreed upon stand and they are not resolved in

[322] Cf. RRT, Decretum *c*. BRUNO, 25 November 1994, no. 5, in *RRT Decr*., 12 (1994), p. 188.

[323] Cf. RRT, Decretum *c*. ALWAN, 11 June 2002, B.Bis 47/02, no. 6, in FANELLI, *Relatio*-IV, pp. 131-132.

[324] Cf. RRT, Decretum *c*. AROKIARAJ, 28 May 2010, no. 4, B.Bis 80/2010, in *StC*, 46 (2012), pp. 251-252.

[325] RRT, Decretum *c*. DORAN, 26 November 1992, no. 10, in *RRT Decr*., 10 (1992), p. 203.

[326] Cf. RRT, Decretum *c*. RAGNI, 26 May 1992, no. 9, in *RRT Decr*., 10 (1992), p. 108.

[327] Cf. RRT, Decretum *c*. BRUNO, 21 July 1995, nn. 7 and 10c, in *RRT Decr*., 13 (1995), pp. 102, 103; B. 5/07, "Relazione 2007," no. III.7, *cit*. (*vide supra* note 39), p. 82. This error did not ultimately occur when the ground invalidly added as if in first instance by the appellate tribunal (without hearing the respondent) was in fact not treated in the sentence, which issued a decision only on the grounds originally established in first instance (cf. B. 106/07, "Relazione 2008," no. III.4, *cit*. [*vide supra* note 33], p. 44).

the sentence, while the grounds decided do not exist in the process since they were never validly established. A similar problem occurs when the formula of the doubt is objectively obscure and the judge arbitrarily selects a ground and a party to which to apply it, and treats this in the sentence.[328]

The definitive sentence can be defective in many other ways which, while causing a measure of injustice, do not cause the irremediable nullity of the sentence. Imperfections in the motivation do not disable the sentence's ability at least partially to decide the controversy, such as when the *in iure* and *in facto* sections do not both provide motivation for the decision,[329] or when the motivation seems to mix the question raised in the formula of the doubt with a different ground.[330] Similarly, when the sentence unifies its treatment of two doubts properly named, it sufficiently resolves the controversy if it gives an appropriate response to both doubts.[331]

At times there may seem to be a lack of correspondence between the formula of the doubt and the sentence which, however, does not deprive the sentence of its ability to resolve the controversy at least partially. This is seen, for example, when the sentence decides a ground not named in the formula of the doubt, while the original ground is in fact inclusive of the added ground.[332] The sentence does not correspond to the formula of the doubt but does resolve the controversy when it renders a decision on all the grounds, some of which were subordinately placed and incompatible with the principal ground; for a valid decision was issued with respect to at least the principal ground.[333] When the "and/or" formulation is used in the formula of the doubt, while this may be wanting for clarity, the sentence at least partially resolves the controversy if it decides at least one of the grounds.[334] It is unjust for the sentence to deal with additional questions not raised in the formula of the doubt, but this does not prevent the sentence from resolving the part of the controversy

[328] Cf. RRT, Decretum *c*. FUNGHINI, 24 May 1989, nn. 13-14, in *RRT Decr*., 7 (1989), p. 106.

[329] Cf. RRT, Decretum *c*. CIVILI, 12 May 1993, no. 4, in *RRT Decr*., 11 (1993), p. 109.

[330] Cf. RRT, Decretum *c*. CABERLETTI, 26 June 1998, no. 5, in *RRT Decr*., 16 (1998), p. 231. In this case, partial simulation *contra bonum sacramenti* is said to be proven for reasons pertaining partially to the exclusion of the sacramental dignity of marriage.

[331] RRT, B. 27/08, "Relazione 2008," no. III.4, *cit*. (*vide supra* note 33), p. 43.

[332] Cf., e.g., a scenario of *dolus* which included the unnamed ground of intention *contra bonum fidei* (RRT, Decretum *c*. FALTIN, 22 January 1992, nn. 11, 12, in *RRT Decr*., 10 [1992], pp. 4-5); or canon 1095, 2º or 3º is the object of the sentence, when "canon 1095" was named in the formula of the doubt (Decretum *c*. BRUNO, 23 April 1993, no. 4, in *RRT Decr*., 11 [1993], p. 66).

[333] Cf. RRT, Decretum *c*. CIVILI, 23 February 1994, no. 2, in *RRT Decr*., 12 (1994), p. 15.

[334] Cf. RRT, Decretum *c*. PINTO, 8 November 1996, no. 5, in *RRT Decr*., 14 (1996), pp. 222-223.

agreed upon in the formula of the doubt.[335] While it is always important for the formula of the doubt to be clear, the appellate tribunal validly decides a ground not specified in its own formula of the doubt, though implicit in the first instance formula of the doubt, since the appellate formula of the doubt as a rule asks whether the first instance sentence is to be confirmed or reformed (*CIC* c. 1639, §1; *CCEO* c. 1320).[336]

6.2 — Defect in the Motivation of the Sentence

By means of the motivation of the definitive sentence, the judge "objectivizes" his free evaluation of the evidence. Without this objectivization, the decision would appear to be an arbitrary one, based merely on the whim of the judge. This motivation must be both juridical and factual (*tam in iure quam in facto*).[337] That is, it must articulate the abstract juridical principles that pertain to the substantive and procedural presuppositions and implications of the decision, as well as the concrete, proven facts drawn from the acts of the cause. Because of its importance, the defect of motivation in the sentence causes its remediable nullity.

Sometimes this defect arises from a partial or seriously disordered motivation, such as when the *in iure* section deals with only one ground and the *in facto* section deals with only the other,[338] or when the dispositive portion was in the negative but had an *in iure* and *in facto* section that argued in the affirmative.[339] It was also seen in one sentence wherein only principles of secular law were cited in the *in iure* section, while the *in facto* section referred to none of the assertions of witnesses or parties pertaining to the proof of the allegation.[340]

Most commonly, though, this defect is a matter of there being no motivation. When this occurs, the sentence appears devoid of any logic: "The task of the judge was thus reduced to begging the question: 'The marriage in the case is null, because it is null.'"[341] In one case, the motivation for the sentence was found in a document separate from the "definitive sentence,"

[335] Cf. RRT, A. 154/07, "Relazione 2008," no. III.4, *cit*. (*vide supra* note 33), p. 47.
[336] Cf. RRT, Decretum *c*. BOTTONE, 8 March 2000, B.Bis 28/00, in FANELLI, *Relatio*-IV, p. 49.
[337] Cf. *CIC* cc. 1611, 3º; 1612, §3; *CCEO* cc. 1294, 3º; 1295, §3.
[338] Cf. RRT, Decretum *c*. CIVILI, 12 May 1993, no. 4, in *RRT Decr*., 11 (1993), p. 109.
[339] Cf. RRT, Decretum *c*. RAGNI, 12 October 1993, nn. 2-8, in *RRT Decr*., 11 (1993), pp. 152-157.
[340] Cf. RRT, Decretum *c*. DE LANVERSIN, 5 June 1996, no. 21, in *RRT Decr*., 14 (1996), p. 100.
[341] RRT, Decretum *c*. SERRANO RUIZ, 14 December 1988, no. 5, in *RRT Decr*., 6 (1988), pp. 233-234.

which lacked motives or reasoning. The document containing the motives was not published to the parties; thus the sentence remained unmotivated.[342] In another case, after a negative sentence was issued, the petitioner appealed the sentence, and the dissenting judge wrote a dissenting opinion. The second instance sentence issued an affirmative decision but, without providing its own motivation, simply referred itself to the opinion of the dissenting judge, which is to be kept in secrecy.[343]

The decree of confirmation of an affirmative sentence in a cause of marriage nullity must contain motives for its decision, at least summarily or by way of reference to the motivation in another act.[344] This is required not only because it is a not merely procedural decree,[345] but also because that decree has the force and character of a definitive sentence (*ad instar sententiæ definitivæ*). Accordingly, a decree of confirmation that neither provides any of its own motivation nor refers to the motivation in another concrete act—such as "the first instance affirmative sentence in the case"—is remediably null due to the defect of motivation.[346] The same is true of a decree of confirmation whose very brief rationale does not pertain to the allegation. In one decree of confirmation, the partial simulation against indissolubility was said to be proven because one of the parties' children had not been baptized; this fact does not pertain directly to the question, and its relevance is by no means evident.[347]

The remediable nullity of the decree admitting a cause to an ordinary examination has also been said to follow when it lacks motivation.[348] This, however, is a disputed point in jurisprudence, since some hold that decree to be a merely ordinatory (or procedural) decree[349]—since it does not issue a

[342] Cf. RRT, Decretum *c*. BOCCAFOLA, 18 January 2007, B.Bis 3/07, no. 11, unpublished, pp. 5-6.

[343] Cf. RRT, Decretum *c*. FUNGHINI, 24 May 1989, no. 15, in *RRT Decr*., 7 (1989), p. 107.

[344] "Although in these decrees it would be better for there to be more elaborate motivations for confirming the preceding sentence, one must not speak of the nullity of the decree if it at least remits itself to the motives or reasoning of the same confirmed sentence" (RRT, Decretum *c*. CORSO, 17 October 1990, no. 6, in *RRT Decr*., 8 [1990], p. 145).

[345] Can. 1617 — Ceteræ iudicis pronuntiationes, præter sententiam, sunt decreta, quæ si mere ordinatoria non sint, vim non habent, nisi saltem summarie motiva exprimant, vel ad motiva in alio actu expressa remittant. (Cf. *CCEO* c. 1300.)

[346] Cf. RRT, Decretum *c*. DORAN, 30 June 1989, no. 9, in *RRT Decr*., 7 (1989), p. 136; Sententia interlocutoria *c*. FUNGHINI, 29 November 1990, no. 14, in *RRT Dec*., 82 (1990), p. 832; Decretum *c*. BURKE, 26 March 1992, no. 9, in *RRT Decr*., 10 (1992), pp. 38-39.

[347] Cf. RRT, Decretum *c*. DE LANVERSIN, 5 June 1996, no. 13, in *RRT Decr*., 14 (1996), p. 97.

[348] Cf. RRT, Decretum *c*. PALESTRO, 3 July 1991, no. 6, in *RRT Decr*., 9 (1991), p. 96.

[349] Cf. RRT, Decretum *c*. BRUNO, 28 February 1992, no. 6, in *RRT Decr*., 10 (1992), p. 25; Decretum *c*. FUNGHINI, 6 November 1996, no. 6, in *RRT Decr*., 14 (1996), p. 209; Decretum *c*. STANKIEWICZ, 24 July 1997, no. 10, in *RRT Decr*., 15 (1997), p. 156.

decision *de merito*—while others insist that it is a decisive decree that must be motivated in order to take effect.[350]

While an inadequate, unconvincing motivation diminishes the ability of the sentence to do full justice to the gravity of the questions raised by the formula of the doubt, it does not cause the remediable nullity of the sentence. The sentence need not respond to every argument raised in the discussion; for, in assenting to the arguments of one party on a given question, it implicitly rejects the arguments of the other party.[351] Also, the brevity of the motivation does not invalidate the sentence, provided that it is at least relevant to the object of the trial and effective in giving a substantive explanation of the motives.[352] A generic decision that does not indicate the ground but only whether or not moral certitude is reached may even be sufficient for the validity of the sentence, provided that there is no doubt about the ground being evaluated and resolved. In one case, the sentence declared the nullity of marriage without specifying the ground, but the second of two grounds in the case was actually subordinated to the first. Therefore, one could justly presume that the motivation was dealing with the principal ground.[353]

6.3 — Defect of the Signatures Required by Law

The nature of this defect, which pertains to the authenticity and authority of the definitive sentence, is self-evident, inasmuch as the legislator requires that all the judges (or a single judge) as well as a notary sign the sentence (*CIC* c. 1612, §4; *CCEO* c. 1295, §4). It can also be seen in a more subtle factual situation, such as when the second instance tribunal consisted of a sole judge—which may point to other motives for the nullity of the sentence. For in such a case, the required number of judges did not sign the sentence.[354]

This defect did not occur in one case in which one of the judges did not sign the sentence—because he had resigned from office—but his signature was on the dispositive part of the sentence (*folium dispositivum*) signed by

[350] Cf. RRT, Decretum *c*. CIVILI, 5 May 1999, no. 5, in *RRT Decr*., 17 (1999), p. 5.

[351] Cf. RRT, B. 70/05, "Relazione 2006," no. III.4, *cit*. (*vide supra* note 55), p. 108. This has been observed in jurisprudence for many years; see STANKIEWICZ, "Chapter I. The Plaint of Nullity of the Judgement," in *op.cit*. (*vide supra* note 1), p. 1554.

[352] Cf. RRT, Decretum *c*. SERRANO RUIZ, 12 June 1992, no. 6, in *RRT Decr*., 10 (1992), pp. 124-125.

[353] Cf. RRT, Decretum *c*. CORSO, 16 January 1990, no. 9, in *RRT Decr*., 8 (1990), pp. 9-10.

[354] Cf. RRT, Decretum *c*. BRUNO, 21 July 1995, no. 8, in *RRT Decr*., 13 (1995), p. 102.

the judges on the occasion of the judges' session at which they made the decision (cf. *DC* art. 248, §6). When the sentence was published, a photocopy of this document together with the explanation of the judge's resignation adequately supplied for his signature.[355]

Conclusion

In general, canonical legislation finds a necessary complement in canonical jurisprudence. For, due to our fallen human nature, the dynamism of any juridical system tends to be most vividly witnessed in the contention of those subject to it; and such contention leads very often to the intervention of the judiciary, whose decisions have sapiential and sometimes even juridical value beyond the scope of the litigation. This is true to a significant degree in the jurisprudence of the Roman Rota on the matter of the nullity of the sentence. The fitting generality of legislation in this matter lends itself to be complemented by jurisprudence, and the Roman Rota is the regular judicial organ that adjudicates this question at the level of the Apostolic See, thus giving way to apostolic jurisprudence.

This jurisprudence further concretizes the motives of nullity established by the legislator by revealing the constancy of its decision-making pattern in frequently recurring situations—especially scenarios of the absolute incompetence of the judge and the denial of the right of defence. Beyond this, as it were, exegetical value of this jurisprudence, the Roman Rota provides important general principles that are at play when the judge or any jurist analyzes the nullity of acts of the power of governance. The rule *potius valeat quam pereat*, which implies also the odious nature of the nullity of such acts, reinforces in the canonical system an orientation toward the conservation of acts, not only for the stability of the juridical order, but also for the respect due to acts of ecclesiastical power, which flows from the Divine Founder of the Church in virtue of apostolic succession.

The rule of equity, so critical to our juridical order, resists a merely positivistic examination of violations of procedural law. This is a continuous theme in the area of the right of defence. One must unfailingly acknowledge the illegitimacy of irregularities such as the omission of the citation, defects in the citation (e.g., the *causa petendi*), the non-communication of the formula of the doubt and the names of witnesses, and so on. At the same time,

[355] Cf. RRT, Sententia interlocutoria CABERLETTI, 19 July 2002, no. 6, in *RRT Dec.*, 94 (2002), pp. 522-523.

jurisprudence demonstrates that the violations of the right of defence occurring in such situations are to be considered *de facto* sanated by the, albeit untimely but, sufficient notification of such information. It is thus incumbent upon the judge to try to exclude the possibility of the *de facto* or *de iure* sanation of procedural defects prior to hastening to declare null an act of ecclesiastical judicial power.

In any case, the goal of the legislator and the judge is and should be the promotion of the stability of the judicial order—when the nullity of the sentence is not certain—and the subsequent correct administration of justice—when this order has been disturbed by illegitimate acts of the judge. For in this way, it is possible for the Church's judicial system to bring to realization her vocation in the world to be the *speculum iustitiæ* and so direct the gaze of all to the Just One who is to come to judge the living and the dead.

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LE POUVOIR DE GOUVERNEMENT ET LE DIACRE

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RÉSUMÉ — Cet article présente une analyse canonique des divers pouvoirs de gouvernement qui peuvent être exercés par un diacre, et ce plus particulièrement depuis la modification des canons 1008 et 1009 dans *Omnium in mentem*. Il cherche à cerner les fondements ontologiques de la capacité du diacre à exercer le pouvoir de gouvernement. La première partie présente brièvement la pensée fondamentale du deuxième Concile du Vatican au sujet des sources théologiques du pouvoir dans l'Église, tel que le pouvoir sacré (*sacra potestas*) conféré par le sacrement de l'Ordre, ainsi que les traits principaux du concept juridique de pouvoir de gouvernement au sein du système canonique actuel. L'auteur se propose ainsi d'énoncer une définition canonique précise du pouvoir de gouvernement qui, à son tour, pourrait être utilisée dans le cadre d'une analyse de la participation du diacre à l'exercice du pouvoir de gouvernement. La deuxième partie cherche à déterminer si l'ordination diaconale confère une nouvelle capacité ontologique qui habilite le diacre à assumer des positions de pouvoir juridique plus importantes et si cette capacité diffère de celle des autres ordres sacrés et de celle du laïc. L'auteur situe le diaconat au sein de la dynamique du sacrement de l'Ordre en examinant la nature, le rôle et les effets sacramentels et juridiques de l'ordination diaconale, ainsi qu'en se penchant sur la façon dont ceux-ci déterminent l'étendue et les particularités de la participation du diacre à l'exercice du pouvoir de gouvernement dans l'Église.

SUMMARY — This article presents a canonical analysis of the various powers of governance which can be exercised by a deacon, particularly since the modification of canons 1008 and 1009 in *Omnium in mentem*. It seeks to identify the ontological foundation of the deacon's capacity to exercise the power of governance. The first part briefly presents the Second Vatican Council's fundamental understanding of the theological sources of power within the Church, such as sacred power (*sacra potestas*) conferred

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by the holy orders, as well as the principal traits of juridical concept to the power of governance within the current canonical system in order to propose a precise canonical definition of the power of governance that, in turn, can be used to analyze the deacon's participation in the exercise of the power of governance. The second part addresses whether or not diaconal ordination confers a new ontological capacity which enables the deacon to assume positions of greater juridic power, and whether or not this capacity differs from that of the other orders of sacred ministry and from the lay-person. The author situates the diaconate within the dynamic of the sacrament of holy orders by examining the nature, the role, and the sacramental and juridical effects of diaconal ordination, and by investigating how these determine the extent and particularities of the deacon's participation in the exercise of the power of governance within the Church.

Introduction

Depuis le rétablissement du diaconat en tant que degré distinct et permanent de la hiérarchie suite au concile œcuménique Vatican II, le nombre de diacres participant à l'exercice du pouvoir de gouvernement dans l'Église ne cesse d'augmenter. Leur présence de plus en plus marquée dans les structures de gouvernement de l'Église n'a pas manqué, toutefois, de susciter chez plusieurs théologiens et canonistes une série de questions inédites concernant le rapport entre le diaconat et le pouvoir ecclésiastique. D'un côté, la réflexion théologique contemporaine cherche à mieux expliquer comment le pouvoir sacré (*potestas sacra*) conféré au diacre par le sacrement de l'Ordre se distingue de celui qui est conféré à ceux qui sont constitués dans l'ordre de l'épiscopat et du presbytérat. De l'autre côté, la science canonique tente sans cesse de mieux définir et circonscrire dans la législation canonique la participation du diaconat à l'exercice du pouvoir de gouvernement dans l'Église.

Cet étude aura donc pour but d'effectuer une analyse canonique des pouvoirs de gouvernement pouvant être exercés par le diacre dans le *Code de droit canonique* (*CIC*) de 1983, particulièrement depuis les modifications des canons 1008 et 1009 par Benoît XVI dans sa lettre apostolique en forme de *motu proprio Omium in mentem* du 26 octobre 2009, afin de répondre à la question suivante : Quel est le fondement ontologique de la capacité du diacre pour exercer le pouvoir de gouvernement ? Est-il le baptême, comme pour tous les fidèles, ou bien à la fois le baptême et l'ordre, comme pour les prêtres et les évêques ?

Pour accomplir cet objectif, cette étude devra d'abord chercher à définirle concept de pouvoir de gouvernement et à expliquer son fonctionnement

au sein du système canonique du Code de 1983. Une analyse de certains textes conciliaires concernant la structure constitutionnelle de l'Église sera également effectuée afin de dégager les fondements théologiques derrière la doctrine canonique actuelle au sujet du pouvoir ecclésiastique. La première section sera consacrée à cette question.

La deuxième section abordera ensuite plus spécifiquement la question de la participation du diacre dans l'exercice du pouvoir de gouvernement dans l'Église. Il tentera de clairement déterminer la capacité juridique du diacre à exercer ce pouvoir et d'expliquer la spécificité de cette capacité au niveau théologique et doctrinal. Plus précisément, une étude ciblée des canons portant sur le sacrement de l'Ordre et le diaconat sera effectuée afin de mieux comprendre, tant au niveau théologique qu'au niveau canonique, la source, la nature et l'étendu du pouvoir de gouvernement du diacre dans l'Église.

Cette étude traitera principalement du droit canonique latin, quoique certains parallèles seront faits avec le droit canonique oriental afin d'en faire ressortir ses particularités relatives au pouvoir de gouvernement du diacre. Finalement, cette étude ne visera pas à établir une liste exhaustive des divers offices ecclésiastiques et fonctions juridiques de pouvoir pouvant être exercés par le diacre mais plutôt à faire ressortir les particularités de sa participation dans le but de démontrer comment celle-ci apporte une contribution unique à la réalisation de la mission universelle de l'Église.

1 — *Les sources du pouvoir et des munera dans l'Église*

L'exercice du pouvoir dans l'Église s'inscrit à l'intérieur d'une conception théologique et juridique du pouvoir qui tire elle-même ses sources directement de la structure et de la mission de l'Église instituée par le Christ. C'est seulement qu'à partir de ces notions fondamentales qu'il devient possible de définir la nature, le rôle, la structure et le fonctionnement du pouvoir ecclésiastique dans l'Église. La doctrine canonique relative au pouvoir de gouvernement en est directement inspirée. Pour bien situer la place qu'occupe le diaconat dans l'exercice du pouvoir de gouvernement dans l'Église, il s'avère d'abord nécessaire d'examiner l'ensemble de ses éléments et des liens qui existent entre eux.

Cette première section traitera donc des sources théologiques et juridiques du pouvoir dans l'Église. Il présentera brièvement les notions fondamentales de la doctrine conciliaire à l'égard de la structure constitutionnelle et hiérarchique de l'Église ainsi que des sources théologiques du pouvoir ecclésiastique. Ensuite, elle situera le concept de pouvoir de gouvernement

au sein du système canonique dans le but d'en extirper une définition canonique précise qui servira de point de repère pour analyser la participation du diacre dans l'exercice de ce pouvoir dans l'Église. Pour terminer, les caractéristiques majeures de la doctrine canonique contemporaine portant sur le pouvoir de gouvernement seront présentées afin de souligner ses structures et modalités fondamentales.

1.1 — La structure constitutionnelle de l'Église

Le mot « Église » (*ekklèsia*, du grec *ek-kalein*, « appeler hors ») signifie « convocation »[1]. Dans les textes conciliaires, elle est décrite comme étant une « réalité complexe comportant un double élément humain et divin »[2]. D'un côté, l'Église est vue comme étant une réalité spirituelle et invisible : Elle est le peuple que Dieu convoque et rassemble dans le monde entier, pour constituer l'assemblée de ceux qui, par la foi et par le Baptême, deviennent fils de Dieu, membres du Christ et temple de l'Esprit Saint. En tant que fidèle du Christ (*christifidelis*) et membre du peuple de Dieu, tout baptisé jouit d'un nouveau statut spirituel et juridique qui lui donne le droit, le devoir et la capacité (mais non du pouvoir) de participer, à sa manière, à la triple fonction (*munus*) prophétique, sacerdotale et royale du Christ et à exercer, chacun selon sa condition propre, la mission que Dieu a confié à l'Église pour qu'elle l'accomplisse dans le monde[3]. Établi par le Christ en « communion de vie, de charité et d'amour » (*LG*, 9), l'Église est ainsi appelée à être dans le monde le sacrement visible du salut, le signe et l'instrument de la communion de Dieu et des humains (*CÉC*, 780). Au sein de l'Église, la vie ecclésiale et la communion (*communio*) entre baptisés s'expriment principalement par une participation dans les mêmes croyances religieuses, les mêmes moyens de salut (surtout

[1] Voir *Catechismus Ecclesiae catholicae*, texte typique latin, 11 octobre 1992, Libreria editrice Vaticana, 1997, traduction française dans *Catéchisme de l'Église catholique*, éd. définitive, Ottawa/Paris, CECC/Bayard Éditions/Centurion/Fleurus - Mame/ Cerf, 1998, n° 751 (= *CÉC*).

[2] Voir CONCILE VATICAN II, Constitution dogmatique sur l'Église *Lumen gentium*, 21 novembre 1964, dans *AAS*, 57 (1964), pp. 5-75, traduction française dans *Vatican II : les seize documents conciliaires : texte intégral*, nouv. éd., Saint-Laurent, QC, Fides, 2001, n° 8 (= *LG*) ; *CÉC*, 771.

[3] Voir *Codex iuris canonici, auctoritate Ioannis Pauli PP. II promulgatus, fontium annotatione et indice analytico-alphabetico auctus*, Libreria editrice Vaticana, 1989, texte français *Code de droit canonique, texte officiel et traduction française*, préparé par la SOCIÉTÉ INTERNATIONALE DE DROIT CANONIQUE ET DE LÉGISLATIONS RELIGIEUSES COMPARÉES, Paris, Centurion et Ottawa, Tardy, CECC, 1984, canon (= c.) 204, § 1 (= *CIC*).

les sacrements) et par une soumission aux pasteurs dûment désignés par le Christ pour gouverner l'Église[4].

De l'autre côté, l'Église est également une société visible organisée, dotée de structures, de lois et d'organes hiérarchiques[5] afin d'accomplir sa mission salvatrice dans ce monde et d'assurer un ordre social juste dans lequel les droits et les devoirs sont attribués et respectés par tous ses membres[6]. C'est pour cette raison que, par institution divine, il y a dans l'Église, parmi les fidèles, certains qui sont choisis et désignés d'une manière nouvelle et particulière pour servir[7] et paître le Peuple de Dieu[8]. Ceux-ci se voient conférés un pouvoir (*potestas*) et attribués diverses fonctions (*munera*) pastorales dans l'Église (qui ont pour but une finalité spirituelle).

1.2 — Les positions doctrinales concernant la notion du pouvoir ecclésiastique

La réalisation des fonctions pastorales dans la société ecclésiastique présuppose l'existence d'un pouvoir juridique de gouvernement dans L'Église. Ce pouvoir, toutefois, possède des caractéristiques spéciales en raison de la structure sacramentelle de l'Église[9].

La notion de « pouvoir » dans l'Église peut être considérée d'une perspective théologique ou bien d'une perspective juridico-canonique. Ces deux perspectives sont complémentaires mais distinctes[10] comme nous le verrons bientôt. Vu le vif débat suscité par cette question auprès des canonistes

4 Voir *CIC*, cc. 205 ; 209 ; 212 ; voir aussi J. ARRIETA, *Governance Structures within the Catholic Church*, Montréal, Wilson & Lafleur, 2000, pp. 3-4 (= ARRIETA, *Governance Structures*).

5 Voir *LG*, 8 ; voir aussi *CÉC*, 771.

6 ARRIETA, *Governance Structures*, pp. 17-18.

7 Dans l'Église, le mot « pouvoir » se réfère à l'exercice de l'autorité, telle que le Christ l'a exercé historiquement et telle qu'il l'a demandé de l'exercer, c'est-à-dire comme un « service ». Cette façon d'exercer le pouvoir à l'image du Christ a été rappelée avec insistance par Vatican II (*cf. LG*, 24 ; 27 ; 32, etc.). Certes, au sujet de l'exercice du pouvoir épiscopal, *LG*, 2, affirme que « cette charge que le Seigneur confia aux pasteurs de son peuple, est un véritable service, qui dans les saintes Écritures est précisément appelé *diakonia* (*cf.* Ac 1, 17 et 25 ; 21, 19 ; Rm 11,13 ; 1 Tm 1, 12), c'est-à-dire ministère ».

8 Voir *CIC*, cc. 207, § 1 ; 1008, § 1.

9 Voir ARRIETA, *Governance Structures*, p. 18.

10 Ibid. ; *cf.* J. HUELS, « The Power of Governance and its Exercise by Lay Persons : A Juridical Approach », dans *Studia Canonia* (= *StC*), 35/1 (2001), pp. 59-62 (= HUELS, « The Power of Governance »).

depuis le Concile Vatican II[11], ces distinctions deviennent d'autant plus importantes à comprendre afin d'éviter la confusion dans les termes et de pouvoir clairement délimiter les paramètres de chaque perspective. De plus, vu que l'objectif de cette section est d'examiner le pouvoir de gouvernement sous une perspective juridique, je ne ferai qu'exposer sommairement les trois principales positions doctrinales concernant la notion du pouvoir ecclésiastique[12] avant de procéder à une étude juridico-canonique plus approfondie de ce pouvoir.

Du point de vue théologique, le débat entourant la notion du pouvoir ecclésiastique se situe au niveau de la compréhension de la nature, le moyen de transmission et qui peut exercer le pouvoir ecclésiastique. Chaque école de pensée tente de situer à sa manière la relation entre le pouvoir d'ordre (*potestas oridinis*) conféré par le sacrement d'Ordre et le pouvoir de gouvernement (ou de juridiction) (*potestas regiminis*) conféré par une mission canonique.

La première école de pensée, dîte de Munich, affirme une stricte unicité du pouvoir dans le sacrement de l'Ordre. Le pouvoir d'ordre est conféré directement et immédiatement par le Christ lors de l'Ordination et donne à l'ordonné la capacité ontologique pour pouvoir exercer le pouvoir de gouvernement dans l'Église : le « pouvoir sacré » (*sacra potestas*). L'Ordination est vue comme la source unique du pouvoir et une condition *sine qua non* pour exercer le pouvoir de gouvernement dans l'Église[13]. Par conséquent, seul un ministre ordonné peut recevoir une mission canonique qui requiert l'exercice du pouvoir de gouvernement.

La deuxième école de pensée, dîte romaine, maintient qu'il y a deux sources distinctes de pouvoir ecclésiastique dans l'Église : le pouvoir d'ordre et le pouvoir de gouvernement[14]. Les deux pouvoirs prennent source dans le Christ mais sont transmis de façons distinctes : l'une sacramentelle (l'Ordre) et l'autre non-sacramentelle (mission canonique)[15]. Par conséquent, il est possible pour le fidèle laïc de se voir confier certaines *munera* dans l'Église requérant l'exercice du pouvoir de gouvernement qui n'exigent pas également le pouvoir d'ordre.

[11] *Cf.* J. BEAL, « The Exercise of the Power of Governance by Lay People : The State of the Question », dans *The Jurist*, 55 (1995), p. 1.

[12] Pour une étude approfondie de ces principales positions doctrinales concernant le pouvoir de gouvernement voir ibid., pp. 1-92.

[13] Voir M. WIJLENS, commentaire du c. 129, dans *CLSA Comm2*, pp. 184-185 ; voir aussi BEAL, pp. 18-34.

[14] Voir BEAL, p. 35.

[15] *Ibid*., p. 39.

Finalement, la troisième école de pensée, appelée l'école de Navarre, soutient que le sacrement de l'Ordre ne confère que la fondation ontologique du pouvoir tandis que le pouvoir de gouvernement est obtenu par mission (mandat) canonique. Cette théorie se distingue par le fait qu'elle attribue le caractère fondamental du pouvoir au sacrement et démontre une méthodologie précise qui distingue les deux éléments dans le phénomène du pouvoir[16].

1.3 — Les aspects ontologiques et juridiques du concept de pouvoir dans l'Église

Les positions doctrinales présentées ci-dessus nous permettent de faire une distinction clé entre la capacité ontologique reçue par le sacrement de l'Ordre et le pouvoir juridique.

Au point de vue théologique, certains fidèles, par le sacrement d'Ordre, reçoivent une configuration particulière au Christ, qui est essentiellement différente de celle du baptême, et sont investis d'une *sacra potestas* qui l'habilite à agir pour le bien des autres. La *sacra potestas* a un caractère ontologique. Elle l'habilite, selon le niveau d'ordre reçu, à exercer les *tria munera*[17] : les fonctions d'enseignement (*munus docendi*), de sanctification (*munus santificandi*) et de gouvernement (*munus regendi*) au nom de l'Église.

Au point de vue juridique, le pouvoir de gouvernement n'est pas perçu principalement comme une capacité ontologique qui enrichit le sujet mais une habilitation juridique conférée à une personne idoine de la part d'une autorité ecclésiastique compétente par l'entremise d'une mission (mandat) canonique pour poser des actes juridiques dans l'exercice d'une fonction pastorale dans l'Église. En d'autres mots, lorsque la possibilité légitime existe, il peut y avoir un véritable pouvoir juridique, malgré l'absence de la capacité ontologique spéciale (sacrement de l'Ordre)[18].

On peut alors conclure que le pouvoir de gouvernement dans l'Église est octroyé ni directement par le sacrement du Baptême et/ou le sacrement de l'Ordre mais par mandat juridique, soit par la loi ou bien par délégation personnelle. Tout en étant liés aux notions théologiques de la *sacra potestas*, le *munus regendi* et le pouvoir d'ordre, le pouvoir de gouvernement est distinct parce qu'elle est une notion essentiellement juridique régie par le

16 Voir ARRIETA, *Governance Structures*, p. 19.
17 *Ibid*., p. 20.
18 Ibid.

droit ecclésiastique[19] et dont les paramètres peuvent être changés par l'autorité suprême de l'Église.

1.4 — Le pouvoir d'ordre versus le pouvoir de gouvernement

L'étendu de ce pouvoir sacré conféré au clerc varie selon le niveau d'ordre reçu. À cet égard, le *CIC* précise que « ceux qui sont constitués dans l'Ordre de l'épiscopat ou du presbytérat reçoivent la faculté d'agir en la personne du Christ Tête » (*CIC*, c. 1009, § 3). L'expression « en la personne du Christ Tête » fait référence à l'aptitude du prêtre (presbytre et évêque) de poser des actes qui sont organiquement des actes du Christ (ex : consécration du pain et du vin, l'absolution des péchés, etc.). En ces moments précis (et seulement en ces moments), on dit que le prêtre agit « en la personne du Christ Tête »[20] (*in persona Christi capitis*). Or, ce passage fait référence à un type particulier de pouvoir appelé pouvoir d'ordre qui est propre aux ministères ordonnés sacerdotaux (presbytre ou évêque) à qui sont confiés la charge d'exercer le sacerdoce ministériel. Le pouvoir d'ordre est conféré lors de l'ordination presbytérale. Il est requis pour pouvoir célébrer les sacrements de la Confirmation, l'Eucharistie, la Réconciliation, l'Onction des malades et, avec l'ordination épiscopale, l'Ordre. Le pouvoir d'ordre est relié, mais distinct, du pouvoir de gouvernement parce que certains pouvoirs de gouvernement ne peuvent être exercés que par le prêtre ou l'évêque (ex : pouvoir de législation réservé à l'Évêque mentionné au c. 391, § 2 du *CIC*). Le pouvoir d'ordre est un pouvoir de droit divin qui ne peut être perdu, ni délégué. Une fois ordonné, le prêtre possède ce pouvoir pour la vie. Son usage peut toutefois être suspendu[21].

Cependant, le sacrement d'Ordre, en soit, ne confère pas une capacité juridique spéciale pour lier formellement les fidèles du Christ. Quelque chose de plus est requise pour établir cette relation juridique de pouvoir[22].

1.5 — Le pouvoir de gouvernement à l'intérieur du système canonique

Le *CIC* contient quinze canons qui traitent directement du pouvoir de gouvernement (cc. 129-144) tandis que le *CCEO* en contient seize à ce

[19] Ibid., note 27, p. 78.

[20] Voir BORRAS, *Le diaconat au risque de sa nouveauté*, p. 137 ; voir aussi T. D'AQUIN, *Somme théologique*, Paris, Cerf, 1984-1986, Tome III, question 83, article 7, solution 3 (= *STh*, III, 82, 7 ad 3).

[21] Voir HUELS, « The Power of Governance », pp. 60-61.

[22] Voir ARRIETA, *Governance Structures*, p. 20 ; voir aussi *CIC*, c. 1338, § 2.

même effet (cc. 979-995). Mise à part quelques différences de disposition et de formulation, le contenu des canons dans chaque Code est essentiellement pareil. On peut donc déterminer qu'il n'existe pas de disparité juridique entre les diverses Églises *sui juris* au niveau de la compréhension juridique du pouvoir de juridiction.

1.5.1 — *Définition du pouvoir de gouvernement*

Le *CIC* ne fournit pas une définition précise du concept de pouvoir de gouvernement[23]. Il est donc nécessaire d'examiner l'ensemble des canons de cette section et leur relation avec les canons dans les autres parties du Code pour arriver à en dégager une définition juridique précise[24].

Le sujet du pouvoir de gouvernement est situé dans le Livre I du *CIC* intitulé « Normes générales » immédiatement après les sections traitant des personnes physiques et juridiques ainsi que des actes juridiques mais juste avant celles des offices ecclésiastiques. Toutes ces institutions juridiques sont intimement liées au pouvoir du gouvernement[25]. En tenant compte de tous ces facteurs, Huels parvient à formuler une définition purement canonique du pouvoir de gouvernement. Il définit le pouvoir de gouvernement comme « le pouvoir public conformément attribué par la loi et validement nécessaire pour poser un acte juridique qui est soit législatif, exécutif ou judiciaire »[26]. Il explique que cette définition contient plusieurs avantages car elle est juridiquement précise et dépourvue de toute trace de contenu théologique, c'est-à-dire qu'elle évite toutes les questions théologiques belliqueuses mentionnées auparavant au sujet du pouvoir dans l'Église[27]. Une telle approche cherche ni à contourner la réflexion théologique au sujet du pouvoir dans l'Église, ni à réduire ce pouvoir à une simple notion technojuridique, mais à remplir un des objectifs primaires de la science canonique : de traduire en langage canonique (donc en normes pratiques) la doctrine même de l'Église tout en mettant en lumière les implications spirituelles

[23] Voir HUELS, « The Power of Governance », pp. 63-64. En effet, PARALIEU ira jusqu'à dire que, "Le Code évite de donner une définition du pouvoir… », R. PARALIEU, *Guide pratique du Code de droit canonique : notes pastorales*, Bourges, Tardy, 1985, p. 69. Face à cette situation, plusieurs commentateurs ont tenté de le définir. Pour un recueil de diverses définitions proposées par divers auteurs au sujet du pouvoir de gouvernement voir HUELS, « The Power of Governance », p. 64, note 15.

[24] Ibid., p. 64.

[25] Ibid.

[26] Ibid., pp. 64- 65, « The power of governance is the lawfully granted, public power necessary for validly performing a juridical act that is legislative, executive or judicial ».

[27] Ibid., p. 65.

et pastorales des dispositions de celle-ci[28]. C'est donc pour cette raison que le sens canonique du pouvoir de gouvernement sera retenu et utilisé dans cette étude. Cette définition permettra, entre autres, de déterminer avec précision quelles fonctions et offices ouverts au diacre impliquent véritablement l'exercice du pouvoir de gouvernement.

1.5.2 — *L'acte juridique et l'action liturgique*

Au plan canonique, le pouvoir de gouvernement permet de poser certains types d'actes juridiques. L'acte juridique est un acte humain, posé légalement, par lequel une personne capable[29] manifeste son désir/intention d'apporter un ou des effets juridiques spécifiques reconnus par la loi[30]. Afin de pouvoir validement poser un acte juridique, une personne doit avoir une cause juste, agir intentionnellement et librement. Autrement dit, tout acte juridique nécessite un acte positif de la volonté d'un individuel ou bien d'une entité collégiale qui en a reçu la capacité. De plus, le droit positif peut exiger que d'autres formalités et conditions soient respectées afin qu'un acte juridique soit valide[31].

L'action liturgique, c'est-à-dire la célébration de rites liturgiques (ex : le sacrement de la Réconciliation, les sacramentaux), n'est pas, en soi, un acte juridique, même si certains actes liturgiques peuvent comporter un ou plusieurs effets juridiques (ex : le sacrement du Baptême, le rite d'admission dans la pleine communion de l'Église catholique). En effet, le Code rappelle que « les actions liturgiques ne sont pas des actions privées, mais des célébrations de l'Église elle-même » (*CIC*, c. 837, § 1) qui relève de la fonction de sanctification de l'Église.

1.5.3 — *La triple expression du pouvoir de gouvernement : exécutive, législative, judiciaire*

Le droit canonique explique que le pouvoir de gouvernement dans l'Église peut s'exprimer par trois types distincts d'actes de pouvoir. Ceux-ci sont le

[28] Voir JEAN-PAUL II, Constitution apostolique *Sacrae disciplinae leges*, 25 janvier 1983, dans *AAS*, 75 II (1983), pp. 7-14, traduction française dans *CIC*, p. 9 ; voir aussi A. BORRAS, « Les effets canoniques de l'ordination diaconale », dans *Revue théologique de Louvain*, vol. 28, n° 4, (1997), p. 454 (= BORRAS, « Les effets canoniques de l'ordination diaconale »).

[29] C'est-à-dire, dûment habilitée par la loi.

[30] Voir J. HUELS, *Liturgy and Law : Liturgical Law in the System of Roman Catholic Canon Law*, Montréal, Wilson & Lafleur, 2006, p. 73. (= HUELS, *Liturgy and Law*) « A juridic act is a human act, lawfully placed, by which a person capable in law manifests his/her intention to bring about a specific juridic effect or effects recognized in law » ; voir aussi *CIC*, c. 124, § 1.

[31] Voir *CIC*, cc. 124-125. Voir aussi, E. MOLANO, commentaire sur le c. 124 dans *CIC*, p. 124.

pouvoir exécutif, législatif et judiciaire (*CIC*, c. 135, § 1). Le pouvoir exécutif est exercé à tous les niveaux de l'Église par des déteneurs d'office ecclésiastique, des entités collégiales ainsi que ceux dûment délégués par eux, chacun selon son champ de compétence respectif et les dispositions du droit. Le pouvoir exécutif est exercé soit par acte général ou particulier. L'acte administratif général est la promulgation ou publication de documents administratifs qui ont une portée générale ex : directoires, instructions, lettres circulaires, etc.). Les normes administratives contenues dans ces documents lient juridiquement ceux à qui ils sont adressés (ex : tous les membres du diocèse, tous les curés, etc.). L'acte administratif particulier, pour sa part, est un acte juridique de pouvoir exécutif attribué à une personne seule, physique ou juridique, ou bien pour un groupe déterminé de personnes. Il peut prendre diverses formes mais celles-ci sont généralement regroupées en deux catégories majeures soit les décrets administratifs particuliers et les rescrits[32].

Le pouvoir législatif est exercé principalement par les législateurs de l'Église lors de la promulgation de lois et de certains statuts (*CIC*, c. 94, § 3) ainsi que par l'interprétation authentique de la loi (*CIC*, c. 16, § 2). Les législateurs sont : pour l'Église universelle, le Souverain Pontife et le Collège des évêques réuni en Concile œcuménique unis avec le Souverain Pontife ; à l'intérieur de leur domaine de compétence, les conciles pléniers et provinciaux ; pour les Églises particulières d'une nation ou bien d'une région déterminée, la conférence des évêques ; et l'évêque diocésain dans son diocèse[33]. Le pouvoir législatif ne peut être délégué que de façon expresse par l'autorité suprême de l'Église, c'est-à-dire le Collège des Évêques et le Pontife Romain (*CIC*, c. 135, § 2).

Le pouvoir judiciaire est exercé par le juge dans un tribunal ecclésiastique lorsqu'il prononce une sentence ou émet un décret judiciaire. Le Pontife Romain et l'Évêque diocésain possède le pouvoir judiciaire quoique qu'il est rarement exercé par eux personnellement mais plutôt par l'intermédiaire de juges et de tribunaux déjà constitués[34].

1.5.4 — *Le pouvoir ordinaire et délégué*

Le pouvoir de gouvernement peut être octroyé soit par la loi (*a iure*) ou par délégation personnelle (*ab homine*). Le pouvoir ordinaire de gouvernement

[32] Voir HUELS, *Liturgy and Law*, pp. 80-81.

[33] Voir J. ARRIETA, commentaire sur le c. 135 dans *CIC*, p. 136 ; voir aussi HUELS, *Liturgy and Law*, pp. 79-80.

[34] Voir *CIC*, c. 135, § 3 ; voir aussi J. ARRIETA, commentaire sur le c. 135 dans *CIC*, p. 136 ; et HUELS, « The Power of Governance », p. 80.

est reçu par la collation d'un office ecclésiastique déterminé, pour exercer les compétences assignées par le droit (*CIC*, c. 145, § 2). Celui-ci peut être propre ou vicarial. Le pouvoir ordinaire propre est celui qu'on exerce en son propre nom. Ce type de pouvoir est exercé, par exemple, par le Pontife romain et l'évêque diocésain (*CIC*, cc. 331, § 1 ; 381, § 1). Il suppose une participation immédiate au pouvoir du Christ et une participation médiate de communion, de par le droit, au pouvoir du Pontife suprême[35]. Le pouvoir ordinaire vicarial est celui qu'on exerce au nom d'un autre. Les offices ecclésiastiques de vicaire général et épiscopal sont deux exemples typiques d'un pouvoir de gouvernement ordinaire mais exercé au nom de l'Évêque diocésain (*CIC*, cc. 475, § 1 ; 476). Par conséquent, le pouvoir ordinaire vicarial ne s'exerce qu'en très étroite collaboration avec cet autre et suppose un transfert juridique de compétences[36]. Le pouvoir délégué, quant à lui, est celui conféré à une personne par mandat de délégation et est strictement limité au domaine indiqué dans le mandat[37].

1.5.5 — *Les facultés*

Les divers pouvoirs conférés à une personne, soit par le droit ou par délégation, s'appellent « facultés ». Une faculté est « un pouvoir ecclésiastique ou une autorisation que l'on doit nécessairement détenir pour pouvoir poser légitimement un acte de ministère ou d'administration au nom de l'Église »[38]. La faculté ne touche que les pouvoirs qui sont d'origine ecclésiastique ou humaine, mais non ceux d'origine divine, c'est-à-dire les pouvoirs d'ordre de droit divin conférés au presbytre et à l'évêque lors de leur ordination. Or, on ne dirait pas, par exemple, que le prêtre reçoit la « faculté » de célébrer l'Eucharistie[39].

Une faculté peut être associée à n'importe quelle des trois *munera* de l'Église : (*munus docendi, munus santificandi*, *munus regendi*) mais seulement certaines facultés reliées à la *munus regendi* confèrent un pouvoir de

[35] Voir M. NOBEL, commentaire sur le c. 131, notes de cours DCA 5102 Normes générales I (canons 1-28 ; 96-144), Ottawa, Université saint Paul, 2010, p. 240 (= NOBEL) ; voir aussi J. ARRIETA, commentaire sur le c. 131 dans *CIC*, p. 131.

[36] Voir NOBEL, p. 240 ; voir aussi J. ARRIETA, commentaire sur le c. 131 dans *CIC*, pp. 131-132.

[37] Voir *CIC*, cc. 131, § 1 ; c. 133.

[38] Voir J. HUELS, *Empowerment for Ministry : A Complete Manual on Diocesan Faculties for Priests, Deacons and Lay Ministers*, New York/Mahway, NJ, Paulist Press, 2003, p. 28 (= HUELS, *Empowerment for Ministry*). « A faculty is an ecclesiastical power or authorization necessary for performing lawfully an act of ministry or administration in the name of the Church ».

[39] Ibid., p. 28.

gouvernement. En effet, tandis que la loi ecclésiastique habilite les clercs, à partir de leur ordination, à poser plusieurs actes de ministère reliés aux *munera docendi* et *sanctificandi*, aucune faculté reliée à la *munus regendi* est conférée par l'ordination[40].

Les facultés reliées à la fonction de gouvernement sont aussi appelées facultés juridictionnelles. Celles-ci sont requises pour poser validement des actes administratifs particuliers (ex : accorder une dispense, une commutation, la remise d'une peine) et constituent des actes du pouvoir exécutif de gouvernement. Sans cette faculté, la personne est incapable de poser validement l'acte en question. De plus, les facultés impliquant l'exercice du pouvoir exécutif de gouvernement peuvent être déléguées ou subdéléguées, selon les dispositions du droit (*CIC*, c. 137).

Les autres facultés sont appelées non-juridictionnelles ou autorisations. Celles-ci permettent plutôt de poser des actes de ministère (célébration de sacramentaux, prononcer l'homélie, distribuer la sainte Communion) et d'administration (conclure un contrat, participer à une rencontre œcuménique, etc.) qui ne sont pas des actes de pouvoir de gouvernement. Certaines facultés non-juridictionnelles sont requises pour la validité, d'autres pour la licéité seulement[41].

Au terme de cette première section, nous pouvons conclure que la raison principale pour laquelle la question de l'exercice du pouvoir est si chaudement débattue dans l'Église est que le concept du pouvoir repose sur plusieurs notions théologiques ambigües qui ouvrent la porte à une diversité d'interprétations doctrinales et d'opinions de la part des théologiens et des canonistes. Malgré cette réalité, en rassemblant et en mettant en contexte quelques canons et concepts juridiques clés présentés dans le *CIC*, il devient possible de définir la notion de pouvoir de gouvernement, du moins au niveau canonique. Cet exercice révèle que le pouvoir de gouvernement dans l'Église est un concept principalement juridique dont le sens et le fonctionnement doit, par conséquent, être compris à partir de la discipline du droit canonique plutôt que de l'ecclésiologie. En effet, même si l'existence de pouvoir de gouvernement dans l'Église relève du droit divin, son exercice, par contre, est régi par le droit ecclésiastique. De plus, la réflexion théologique ne doit pas perdre de vue le fait qu'un acte de pouvoir de gouvernement est de même nature, peu importe la personne qui l'exerce (évêque,

[40] Ibid., pp. 31. D'ailleurs, HUELS souligne que ce principe tient même pour l'évêque : même si celui-ci reçoit le *munus regendi* lors de son ordination, cette fonction ne peut être exercée sans avoir reçue une mission canonique comme, par exemple, l'office d'évêque diocésain, vicaire général, une position curiale au Vatican, etc. Voir, ibid, note 7, pp. 31-32.

[41] Voir HUELS, *Liturgy and Law*, pp. 164.

prêtre, diacre ou laïc). Qu'il soit législatif, exécutif ou judiciaire, un acte pouvoir de gouvernement implique des déterminations qui lient légalement, soit favorablement ou défavorablement, un autre qui est sujet au droit. Cet acte est toujours effectué par une personne qui a reçu une autorité légale spéciale.

2 — *La participation du diacre dans la fonction de gouvernement dans l'Église*

Ayant présenté les assises théologiques et juridiques du pouvoir dans l'Église, cette deuxième section abordera maintenant plus spécifiquement la question de la participation du diacre dans la fonction de gouvernement.

Il a été établi dans la section précédante que la fonction de gouvernement dans l'Église se réalise à l'intérieur d'une structure sociale particulière et que celle-ci est accomplie par l'entremise de positions juridiques de pouvoir attribuées via les sacrements (Baptême et l'Ordre) et une mission canonique (la provision d'un office ecclésiastique ou, dans de rares cas, par délégation par la loi). Le diacre peut être appelé à participer, selon son mode, à cette fonction de gouvernement en se voyant confier par une autorité compétente divers offices ecclésiastiques et/ou charges pastorales dans lesquelles sont concédées certaines facultés juridictionnelles l'habilitant ainsi à poser divers actes de pouvoirs de gouvernement.

Mais à quoi habilite exactement la réception du diaconat et dans quelle mesure influence-t-elle la capacité juridique du diacre à exercer le pouvoir de gouvernement dans l'Église ? En d'autres mots, l'ordination diaconale confère-t-elle au diacre une capacité ontologique nouvelle qui affecte du point vue canonique sa capacité de se voir confier des positions juridiques de pouvoir ? Si oui, quelles sont ses limites et comment expliquer les différences avec les autres ministres ordonnés et les laïcs ? Peut-on réellement parler de « *sacra potestas* » pour le diacre ?

Pour répondre à ces questions, il est nécessaire de situer la place du diaconat dans la dynamique du sacrement de l'Ordre en examinant sa nature, son rôle ainsi que certains effets sacramentels et juridiques de l'ordination diaconal. Une analyse ciblée de normes canoniques liées au sacrement de l'Ordre et au diaconat permettra de distinguer l'étendue et les particularités de la participation du diacre à l'exercice du pouvoir de gouvernement dans l'Église. Pour terminer, quelques exemples de la participation du diacre dans l'exercice du pouvoir de gouvernement prévus par le Code actuel seront présentés et commentés à la lumière des résultats d'analyse.

2.1 — La capacité et droit général du diacre à exercer le pouvoir de gouvernement

Le diaconat est traité ni de manière unitaire, ni de manière exclusive dans les deux Codes. En fait, chaque fois que le droit canonique traite des clercs ou du sacrement de l'Ordre, les diacres sont généralement inclus sauf si le contexte ou la lettre même du canon suggère le contraire. Pour comprendre ce que le droit canonique dit au sujet des diacres, il faut donc regarder l'ensemble de la matière[42]. Ceci ne saura se faire sans déloger quelques incohérences au sujet des clercs, comme nous le verrons ci-dessous.

Le *CÉC* souligne que le mot « Ordre » (*ordo*), dans l'antiquité romaine, désignait des corps constitués au sens civil, surtout le corps de ceux qui gouvernent. L'*ordinatio* désignait l'intégration dans un *ordo*. Parallèlement, dans l'Église, l'*ordo* fait référence à divers groupes constitués en corps désignés pour accomplir le ministère apostolique tels que l'ordre des évêques (*ordo episcoporum*), l'ordre des presbytres (*ordo presbyterorum*) et l'ordre des diacres *(ordo diaconorum*) mais aussi d'autres groupes : les catéchumènes, les vierges, les veuves, etc. (*CÉC*, 1536-1537). Aujourd'hui, l'Église réserve le mot *ordinatio* à « l'acte sacramentel qui intègre dans l'ordre des évêques, des presbytres et des diacres et qui va au-delà d'une simple élection, désignation, délégation ou institution car elle confère un don de l'Esprit-Saint permettant d'exercer un "pouvoir sacré" (*sacra potestas*) qui ne peut venir que du Christ Lui-même, par son Église »[43]. En comparant cette affirmation doctrinale avec les diverses écoles de pensée théologique du pouvoir présentées au chapitre précédent, l'on peut constater que du point de vue théologique, l'*ordinatio* confère au diacre un pouvoir sacré qui lui donne une certaine capacité ontologique fondamentale (de droit divin) à agir pour le bien des autres dans l'exercice de la *tria munera* au nom de l'Église. Elle ne confère pas, comme le rappelle la section chapitre précédente, une capacité juridique spéciale pour lier formellement les fidèles du Christ.

Le droit canonique, toutefois, n'emploie jamais l'expression théologique *sacra potestas* pour décrire la capacité ontologique du ministre ordonné à exercer le pouvoir de gouvernement. Le *CIC*, au c. 129, § 1, se contente plutôt d'affirmer au départ que le pouvoir de gouvernement est d'institution divine et que ceux qui ont reçu l'ordre sacré sont « aptes » à l'exercer, selon les dispositions du droit (*CIC*, c. 129, § 1). Ici, le Code cherche d'abord à

[42] Voir A. BORRAS, « Le diaconat dans le Code de droit canonique », dans A. HAQUIN et P. WEBER (dir.), *Diaconat, XXIe siècle : actes du colloque de Louvain-la-Neuve (13-15 septembre 1994)*, Bruxelles, Cerf, Labor et Fides, Lumen Vitae, Novalis, 1997, pp. 173-174.

[43] *CÉC*, 1538 ; voir aussi *LG*, 10.

faire une déclaration générale selon laquelle les clercs, à partir de leur ordination, ont, selon la loi, une capacité juridique générale pour se voir confier des offices et des fonctions ecclésiastiques comportant l'exercice du pouvoir de gouvernement[44].

Le *CIC* renforce ce principe général au c. 274, §1 en affirmant que « seul les clercs peuvent recevoir des offices dont l'exercice requiert le pouvoir d'ordre ou le pouvoir de gouvernement ecclésiastique ». Ce canon semble faire une généralisation qui tient compte ni des degrés variés du sacrement de l'Ordre, car ce n'est pas tous les clercs qui peuvent recevoir n'importe quel office, ni du fait que les laïcs peuvent, en réalité, se voir déléguer certains pouvoirs de gouvernement[45]. En effet, même si le *CIC* affirme clairement que « par la réception du diaconat quelqu'un devient clerc » (*CIC*, c. 266, § 1), en réalité, le droit interdit au diacre un bon nombre d'offices ecclésiastiques comportant un pouvoir de gouvernement. Par exemple, le diacre ne peut être validement nommé ni à un office comportant pleine charge d'âmes (*CIC*, c. 150), comme celui de curé (*CIC*, c. 521, § 1) ou de recteur (*CIC*, c. 556), ni à un office requérant le sacerdoce ministériel comme celui de vicaire paroissial (*CIC*, c. 546), ni aux offices de gouvernance diocésaine de Vicaire général, épiscopal (*CIC*, c. 478, § 1) ou judiciaire (*CIC*, c. 1420, § 4), ni comme membre de certaines entités collégiales impliquées dans le gouvernement diocésain comme le collège des consulteurs (*CIC*, c. 502, § 1). Compte tenu de ces faits, comment expliquer cette contradiction apparente dans le Code et quels facteurs déterminent quels offices et fonctions de gouvernement le droit canonique permet au diacre ?

Huels explique que le c. 274, §1, situé dans la section traitant des obligations et les droits des clercs, doit être compris dans le contexte des droits cléricaux. En vertu de son ordination, le clerc, selon le droit, a « un droit supérieur » au fidèle laïc à obtenir un office qui requiert le pouvoir de gouvernement. Autrement dit, ce canon indique que si un clerc et un laïc sont d'égales compétences pour exercer un office ouvert à soit un clerc ou un laïc, le clerc devrait être choisi si l'office comporte l'exercice du pouvoir de gouvernement[46]. Toutefois, ces canons n'expliquent pas entièrement au plan juridique pourquoi le diacre ne peut accéder à certains offices de gouvernance.

Que dire alors de la *sacra potestas* reçu à l'ordination diaconale et de la capacité juridique générale du diacre à exercer le pouvoir de gouvernement

44 Voir HUELS, « The Power of Governance », p. 79.

45 Pour une étude détaillée de la question des possibilités de pouvoir de gouvernement chez le laïc, voir HUELS, « The Power of Governance », pp. 59-96 et idem, *Empowerment for Ministry*, pp. 175-190.

46 Voir HUELS, « The Power of Governance », p. 81.

énoncé dans les cc. 129 et 274, §1 ? Tout en reconnaissant que la *sacra potestas* et le pouvoir de gouvernement sont des concepts reliés mais distincts, quel rôle cette première joue-t-elle dans la détermination de la capacité juridique du diacre à exercer le pouvoir de gouvernement, comme le fait le pouvoir d'ordre pour le presbytre et l'évêque ? La Commission théologique internationale, se penchant sur cette question, s'interroge,

> Comment affirmer cette sacramentalité (du diaconat) si elle ne confère aucune "*potestas*" spécifique semblable à celle que confèrent le presbytérat et l'épiscopat ... pourquoi une telle ordination si les mêmes fonctions peuvent être réalisées par des laïcs et par les ministères laïcs, de façon peut-être plus efficace et plus souple dans leur fonctionnement ? Nous sommes donc face à une question théologique qui a des répercussions pratiques et pastorales que Vatican II n'aborde pas explicitement et qu'il faut envisager dans la perspective d'une ecclésiologie de communion. Le souhait du concile est d'enraciner toute "*potestas sacra*" dans l'Église de façon sacramentelle : c'est pourquoi il ne considère pas indispensable de recourir à la distinction traditionnelle entre "pouvoir d'ordre" et "pouvoir de juridiction". De toute façon, cela n'a pas empêché sa réapparition dans les documents postconciliaires. Ces oscillations expliquent peut-être la persistance de la question : qu'est-ce que "peut faire" un diacre qu'un laïc ne peut pas faire[47] ?

2.2 — La place du diaconat dans la dynamique du sacrement de l'Ordre

Les canons 1008 et 1009 du *CIC*, récemment modifiés par Benoît XVI dans sa lettre apostolique en forme de *Motu Proprio Omnium in mentum*, datée du 26 octobre 2009, fournissent des points de repères théologiques importants pour mieux comprendre la spécificité de la capacité juridique du diacre à exercer le pouvoir de gouvernement. Ces canons définissent le sacrement de l'Ordre comme suit :

> Can. 1008 - Par le sacrement de l'Ordre, d'institution divine, certains fidèles sont constitués ministres sacrés par le caractère indélébile dont ils sont marqués ; ils sont consacrés et députés pour servir, chacun selon son rang, à un titre nouveau et particulier, le Peuple de Dieu.
>
> Can. 1009 - § 1. Les ordres sont l'épiscopat, le presbytérat et le diaconat.
> § 2. Ils sont conférés par l'imposition des mains et la prière consécration que les livres liturgiques prescrivent pour chacun des degrés.
> § 3. Ceux qui sont constitués dans l'Ordre de l'épiscopat ou du presbytérat reçoivent la mission et la faculté d'agir en la personne du Christ

[47] COMMISSION THÉOLOGIQUE INTERNATIONALE, *Le diaconat : évolution et perspectives*, Paris, Cerf, 2003, chapitre VII, II, 5 (= CTI).

> Tête, mais les diacres sont habilités à servir le peuple de Dieu dans la diaconie de la liturgie, de la Parole et de la charité[48].

La nouvelle formulation du c. 1008 définit le ministère ordonné d'abord et avant tout comme un service (« pour servir ») envers le peuple de Dieu[49] et non plus en termes de capacité de pouvoir. Cette modification est le fruit d'un renouvellement de la pensée théologique au sujet de la relation entre le pouvoir et le ministère ordonné provoqué par le rétablissement du diaconat suite au Concile œcuménique Vatican II. Les nombreuses années d'expériences ecclésiales depuis le Concile ont permis à l'Église de voir plus clair sur la réalité du ministère diaconal et de sa place distincte au sein du sacrement de l'Ordre. Ces facteurs amenèrent éventuellement le Législateur Suprême à adapter les normes canoniques relatives au ministère ordonné afin que ce dernier ne soit plus défini à partir du sacerdoce ministériel, dans lequel le diacre ne participe pas, mais plutôt à partir du service apostolique, commun aux trois degrés du sacrement de l'Ordre[50]. Ce changement met en

[48] Le texte latin de ces nouveaux canons lisent : « c. 1008 - *Sacramento ordinis ex divina institutione inter christifideles quidam, charatere indelebili quo signantur, constituuntur sacri ministri, qui nempe consecrantur et deputantur ut, pro suo quisque gradu, novo et peculiari titulo Dei populu inserviant* ; c. 1009 - § 1. *Ordines sunt episcopatus, presbyteratus et diaconatus*. § 2. *Conferuntur manuum impositione et precatione consecratoria, quam pro singulis pradibus libri liturgici praescribunt*. § 3 « *Qui constituti sunt in ordine episcopatus aut presbyteratus missionem et facultatem agendi in persona Christi Capitis accipiunt, diaconi vero vim populo Dei serviendi in diaconia liturgiae, verbi et caritatis* ». Canons reconstitués à partir du *CIC*, cc. 1008-1009 et BENOÎT XVI, lettre apostolique en forme de *motu proprio* sur la modification de certaines normes du Code de droit canonique *Omnium in mentem*, 26 octobre 2009, dans *AAS*, 102 (2010), pp. 8-10, traduction française dans *DC*, 2444 (2010), pp. 363 (= *Omnium in mentem*).

[49] L'ancien c. 1008 du CIC était formulé comme suit : « Par le sacrement de l'Ordre, d'institution divine, certains fidèles sont constitués ministres sacrés par le caractère indélébile dont ils sont marqués ; *ils sont aussi consacrés et députés pour être pasteurs du peuple de Dieu, chacun selon son degré, en remplissant en la personne du Christ-Tête les fonctions d'enseignement, de sanctification et de gouvernement* » (italiques ajoutés par l'auteur).

[50] Voir F. DENIAU, « Le diaconat à la lumière des trois « fonctions » du Christ et de l'Église, selon Vatican II », dans A. HAQUIN et P. WEBER (dir.), *Diaconat, XXIe siècle : actes du colloque de Louvain-la-Neuve (13-15 septembre 1994)*, Bruxelles, Cerf, Labor et Fides, Lumen Vitae, Novalis, 1997, p. 110. À cet effet, BORRAS ajoute, « La théologie du diaconat apportera aussi sa part propre à la réflexion sur le caractère du sacrement de l'ordre … on ne parlera plus de caractère "sacerdotal" pour désigner indistinctement les ministères des trois ordres (mais de) caractère "ministériel" puisque le concept de ministère devient le concept englobant pour le sacrement de l'ordre… le ministère ordonné ne peut plus être défini par le "sacerdoce" ministériel mais par le ministère apostolique. Au titre de leur ordination, l'évêque de manière éminente et, à leur façon, les prêtres et les diacres … sont les témoins et les garants de l'identité *apostolique* de l'Église ». A. BORRAS et B. POTTIER, *La grâce du diaconat : questions essentielles autour du diaconat latin*, Bruxelles, Lessius,

valeur l'unité des ministères dans l'Église ainsi que la nature intrinsèquement relationnelle du ministère en général. C'est une expression de « l'ecclésiologie de communion » à l'intérieur même du sacrement de l'Ordre pour et avec toute l'Église[51] que le Concile Vatican II a voulu souligner avec tant d'empressement.

Partant du principe unificateur du service apostolique, le c. 1009, § 3 met ensuite en évidence la diversité des ordres en soulignant la différence essentielle entre le sacerdoce commun des fidèles et le sacerdoce ministériel[52] et en clarifiant la législation canonique au sujet de qui peut agir *in persona Christi capitis*. Le canon précise que seulement ceux qui reçoivent le sacerdoce ministériel ont la mission et la faculté d'agir en la personne du Christ Tête dans l'Église tandis que les diacres reçoivent plutôt la force (*vis*) pour servir le peuple de Dieu dans la diaconie de la liturgie, de la Parole et de la charité. Ce canon exprime clairement que le diacre ne reçoit aucun pouvoir d'ordre en vertu de son ordination car il ne participe pas au sacerdoce ministériel mais seulement au sacerdoce commun des fidèles[53].

Le canon fait également référence à une phrase de *LG* qui est considérée par plusieurs commentaires comme étant la « clé de voûte » pour comprendre la nature théologique du diaconat : « Au degré suivant de la hiérarchie se trouve les diacres, qui reçoivent l'imposition des mains "non en vue du sacerdoce, mais du ministère" »[54], c'est-à-dire, non pour la célébration

1998, pp. 35-36 (= BORRAS et POTTIER, *La grâce du diaconat*). Pour une description de la source de la mission des évêques et ses collaborateurs prêtres et diacres, voir aussi *LG*, Chapitre III.

51 En effet, le c. 1008 spécifie que tout ministre sacré est choisi parmi les fidèles. *Cf. CIC*, c. 208.

52 Voir *Omnium in mentem*, pp. 362.

53 Notons ici la différence de terminologie utilisée par le Législateur pour décrire chaque ordre dans le c. 1009, § 3 : Dans le cas de l'épiscopat et du presbytérat l'on fait l'usage d'un langage de pouvoir (mission, faculté d'agir, Christ Tête) tandis que pour le diaconat l'ont privilégie plutôt des expressions reliées au service (habilité à servir, diaconie, charité). De plus, la participation du diacre à la *tria munera* du Christ se voit également transposé en termes nettement plus diaconales (la diaconie de la liturgie (*munus sanctificandi*), de la Parole (*munus docendi*) et de la charité (*munus regendi*). Remarquons qu'ici la fonction de gouvernement du diacre est située dans une perspective de service à la charité de l'Église.

54 *Constitutiones Ecclésiae aegyptiacae*, III, 2 cité dans *LG*, 29. *Cf.* CTI, Chapitre IV, IV, 2 ; CONGRÉGATION POUR L'ÉDUCATION CATHOLIQUE et CONGRÉGATION POUR LE CLERGÉ, *Normes fondamentales pour la formation des diacres permanents*, 22 février 1998, Libreria editrice Vaticana, 1998, n° 5 (= *Normes fondamentales*) ; et aussi COMITÉ DES MINISTÈRES DE L'ASSEMBLÉE DES ÉVÊQUES CATHOLIQUES DU QUÉBEC, *Le diaconat permanent au Québec : Avancées, hésitations, prospectives*, Montréal, Fides, 2006, 8 (= COMITÉ DES MINISTÈRES DE L'AÉCQ).

eucharistique, mais pour le service[55]. Ce passage souligne comment le presbytérat et le diaconat sont des modes différents de participation au sacrement de l'Ordre. Chacun est appelé à remplir une fonction distincte : le prêtre, celle de la présidence eucharistique et communautaire, le diacre, celle du service eucharistique et communautaire. « Signe du Christ Serviteur », le diacre est ministre de la diaconie du Christ « venu pour servir et non pour être servi » (Mc 10, 45). Par son être même, son engagement particulier et son amour pour le service, le diacre signifie la vocation diaconale de toute l'Église[56]. Bref, c'est *ce qu'il est* qui détermine *ce qu'il fait*, y compris sa participation à la fonction de gouvernement dans l'Église.

À ce stade, il m'apparait pertinent de souligner la relation intrinsèque que fait la théologie doctrinale traditionnelle entre le pouvoir dans l'Église et la présidence eucharistique[57]. Cette théologie soutient que la capacité de gouvernement dans l'Église, dans son sens plénier, est étroitement liée à la capacité d'agir en la personne du Christ-Tête (*in persona Christi capitis*)[58] qui donne la *potestas conficiendi sacramenta*, c'est-à-dire littéralement « le pouvoir de confectionner les sacrements », en particulier l'Eucharistie[59]. Cette capacité étant conférée seulement à ceux qui, par le sacrement de l'Ordre, reçoivent le sacerdoce ministériel (les *sacerdotes*, c'est-à-dire le presbytre et l'évêque), eux seuls possèdent la capacité ontologique plénière de gouverner dans l'Église.

Le sacrement de l'Eucharistie étant l'expression liturgique par excellence de la structure constitutionnelle de l'Église, il devient possible de mieux comprendre la relation qu'entretient le diacre avec l'exercice du pouvoir dans l'Église en examinant son rôle et ses fonctions dans la célébration eucharistique. Le diacre ne peut présider l'Eucharistie (*CIC*, cc. 900, § 1 ; 907) mais est plutôt appelé au service de l'autel, assistant le président et guidant l'assemblée pendant la célébration. Parallèlement, le diacre ne peut présider une communauté de fidèles, dans le sens plénier de gouverner une portion du peuple de Dieu, car « L'ordination diaconale installe dans le ministère à la suite du Christ-Serviteur pour entraîner le peuple de Dieu au service du Royaume. Elle n'habilite pas à la présidence de l'Église convoquée par Dieu, mais à son édification et à la mise en œuvre de sa mission »[60].

[55] Voir *Normes fondamentales*, 5.

[56] Voir COMITÉ DES MINISTÈRES DE L'AÉCQ, 23, 25.

[57] Voir HUELS, « The Power of Governance », note 3, p. 59.

[58] Voir *LG* 28 ; voir aussi *PO* 2,6, 12.

[59] Voir A. BORRAS, *Le diaconat au risque de sa nouveauté*, Bruxelles, Lessius, 2007, pp. 153 (= BORRAS, *Le diaconat au risque de sa nouveauté*).

[60] BORRAS, « Les effets canoniques de l'ordination diaconale », p. 481.

À la lumière de ces faits, comment donc situer la *sacra potestas* du diacre par rapport à sa capacité d'exercer le pouvoir de gouvernement dans l'Église si l'on ne peut l'associer au pouvoir d'ordre ? Doit-on considérer la *sacra potestas* du ministère ordonné en termes plus larges ? À cet effet, une étude de la Commission théologique internationale avait elle-même conclut que par rapport aux pouvoirs diaconaux « apparaissent de nouveau des questions de caractère général : la nature ou la condition de la *potestas sacra* dans l'Église, la liaison du sacrement de l'ordre avec la "*potestas conficiendi eucharistiam*", la nécessité d'élargir les perspectives ecclésiologiques au-delà d'une vision étroite de cette liaison »[61].

Pour ce faire, la théologie contemporaine fait face à un problème d'herméneutique de taille car depuis la disparation graduelle du diaconat en tant qu'ordre permanent et autonome dans l'Église à partir du quatrième siècle jusqu'au Concile Vatican II, le sacerdoce était devenu l'unique point de référence dans l'élaboration de toute la théologie du ministère ordonné. C'en est suivi la mise en place d'un langage exclusivement sacerdotal pour décrire le ministère ordonné qui ne tient pas compte de la réalité diaconale. Ce phénomène est particulièrement visible dans les divers textes officiels traitant spécifiquement de la *sacra potestas* et de comment elle s'applique à chacun des trois degrés du ministère ordonné[62]. Ce travail en a illustré quelques exemples. L'émergence du diaconat permanent demeurant une réalité relativement neuve dans l'Église contemporaine, il ne faut pas s'étonner de voir qu'une théologie diaconale du pouvoir plus nette et décisive reste encore à être articulée[63].

2.3 — La participation non-sacerdotale du diacre au sacrement de l'Ordre

Malgré ces obstacles, au cours des dernières années certains théologiens et commentateurs commencent à proposer les bases d'une théologie renouvelée du ministère ordonné qui tient mieux compte de la réalité diaconale et qui réussit à mieux encadrer la *sacra potestas* dans la diversité des ordres sacrés. Parmi ceux-ci, Coriden redéfinit et resitue le pouvoir ecclésiastique

[61] CTI, chapitre IV, conclusion.

[62] Voir W. DITEWIG, « The Exercise of Governance by Deacons : A Theological and Canonical Study », thèse de doctorat, Washington, D.C., Catholic University of America, 2002, pp. 152-155 ; *Cf. LG*, 18(diaconat inclus) ; aussi *CÉC*, 874 (diaconat inclus dans le texte de 1994 mais ensuite exclus dans l'*editio typica* de 1996), 1538 (diaconat inclus) ; et *Normes fondamentales*, 1.

[63] Voir COMITÉ DES MINISTÈRES DE L'AÉCQ, 9.

à la lumière des textes conciliaires en affirmant succinctement que « le pouvoir dans l'Église est le pouvoir de servir »[64]. Ditewig, pour sa part, va encore plus loin en suggérant que la *sacra potestas* conférée par le sacrement de l'Ordre peut être reflétée de deux façons : sacerdotale et kénotique. Tout comme le presbytre participe dans le pouvoir sacré du sacerdoce de l'évêque, ainsi le diacre participe dans le pouvoir kénotique du diaconat de l'évêque. Or, tout comme le sacerdoce commun des baptisés est ordonné au sacerdoce ministériel (*LG*, 10), il peut être dit que la diaconie commune des fidèles est ordonnée au diaconat ministériel ou hiérarchique et que les deux diffèrent non pas seulement en degré mais en essence. Le diaconat ministériel sacramentalise[65] le dépouillement ou kénose (du grec *ekenôsen,* en anglais les expressions souvent employées sont « *kenōsis* » ou « self-emptying ») du Christ par amour pour l'humanité (Jn 1-15 ; Ph 2, 5-8) et ce dont laquelle la communauté entière de ses disciples est conviée. L'exercice du pouvoir kénotique dans l'Église n'est toutefois pas exclusif au diacre : il en est plutôt l'animateur et le signe sacramentel de la vocation diaconale de toute l'Église[66]. Ainsi le souligne Ditewig,

> Le diacre devient un signe de *kénose* du Christ lui-même, un signe que la vie humaine ne consiste pas en la quête de richesses, de possessions et des positions de pouvoir et de domination. Plutôt, la communion des disciples est appelée au dépouillement de soi en répondant aux besoins des autres.[67]

En admettant l'hypothèse de Ditewig, je crois qu'il devient possible d'expliquer de quelle manière la *sacra potestas* conférée par le Christ lors de l'ordination diaconale détermine et encadre la capacité juridique du diacre à se voir confier des positions juridiques de pouvoir. Le sacrement de l'Ordre confère des fonctions (*munera*) importantes dans le ministère de la Parole, du culte divin, de gouvernance pastorale et de service de la charité, sous l'autorité pastoral de l'Évêque[68]. Sa participation au pouvoir

[64] J. CORIDEN, *Canon Law as Ministry : Freedom and Good Order for the Church*, NewYork/ Mahwah, Paulist Press, 2000, p. 108.

[65] Voir *CÉC*, 1570 ; voir aussi *Normes fondamentales*, 11 qui décrit le diacre comme étant « de par l'ordination sacrée…constitué dans l'Église icône vivante du Christ serviteur ».

[66] Voir COMITÉ DES MINISTÈRES DE L'AÉCQ, 18-19.

[67] W. DITEWIG, *The Emerging Diaconate : Servant Leaders in a Servant Church*, New York\ Mahwah, Paulist Press, 2007, p. 166 (= DITEWIG, *The Emerging Diaconate*). « The deacon is suited for such [apostolic] leadership not only in virtue of life experience but through sacramental ordination as well. The deacon stands empowered as a sign of Christ's own *kenōsis*, a sign that human life is not about seeking material wealth, possessions, and positions of power and domination. Rather, the communion of disciples is called to empty themselves in addressing the needs of others ».

[68] Voir *CÉC*, 1596. Le c. 1009 utilise le terme *vis* : l'ordination confère une « force » pour exercer des fonctions importantes… cette « force » ou puissance ne peut être actualisé que

de gouvernement s'inscrit dans le cadre du sacerdoce commun des fidèles reçu au Baptême ainsi que du diaconat ministériel conféré par l'ordination diaconale. Le diaconat ministériel étant kénotique et non sacerdotal, la *sacra potestas* dont est investie le diacre n'habilite pas à gouverner pleinement le peuple de Dieu mais plutôt à le servir d'une manière ordinaire et permanente (cc. 1008 et 1009, § 3).

On peut alors conclure que, du point de vue strictement juridique, la capacité de pouvoir de gouvernement du diacre est identique à celle du fidèle laïc (nonobstant le droit clérical dont il s'agit au c. 274). Toutefois, du point de vue théologique, tout acte de ministère ou d'administration posé par le diacre dans le cadre de sa participation dans les *tria munera* du Christ, y compris tout acte de pouvoir de gouvernement, revêt une portée christique qui est propre au ministre ordonné. Pour sa part, « le diaconat rappelle, de façon sacramentelle en particulier, que l'Église est au service de l'accomplissement du Royaume de Dieu dans le monde à l'exemple du Christ serviteur »[69]. Cette conclusion rejoint la pensée de Huels qui soutient que deux actes de pouvoir ayant le même poids juridique peuvent avoir une portée théologique et ecclésiologique différente dépendamment de l'intention de l'acte et de la nature de la personne juridique à partir duquel l'officiel agit[70].

2.4 — La participation du diacre dans l'exercice du pouvoir du gouvernement dans l'Église

Ayant examiné les éléments canoniques et théologiques qui caractérisent la participation du diacre dans l'exercice du pouvoir de gouvernement dans l'Église, cette dernière partie présentera les principales fonctions de gouvernement ecclésiastique dont le diacre pourrait se voir confiées dans le Code actuel. Sans être exhaustifs, les quelques exemples qui seront présentés chercheront d'abord à illustrer comment le Code actuel circonscrit la participation du diacre dans les domaines exécutif, législatif et judiciaire. Quelques liens seront faits quant aux particularités de cette participation à la lumière des fondements théologiques du pouvoir du diacre présentés ci-dessus.

sous l'autorité pastorale de l'Évêque. Le changement dans le *CIC* vient donc préciser le texte du *CÉC*. Le terme latin « *munus* » a plusieurs significations, l'une d'entre elles étant « service ». Donc, le sacrement de l'offre confère la « force » ou puissance pour être au service dans les ministères de la Parole, etc.

69 COMITÉ DES MINISTÈRES DE L'AÉCQ, 15.

70 Voir HUELS, « The Power of Governance », p. 95.

2.4.1 — *Participation à l'exercice du pouvoir exécutif*

Certaines facultés habituelles comportant un pouvoir exécutif de gouvernement sont fournies par le droit ecclésiastique universel au diacre, en vertu de son ordination. Celles-ci impliquent généralement le pouvoir d'accorder certaines dispenses dans des situations très précises. Par exemple, en cas de danger de mort ou bien s'il est impossible d'atteindre l'Ordinaire du lieu, le droit universel permet au diacre de dispenser les parties au mariage, tant de la forme à observer dans la célébration du mariage que de tous et chacun des empêchements de droit ecclésiastique publics ou occultes, excepté de l'empêchement provenant de l'ordre sacré du presbytérat (*CIC*, c. 1079, § 2). De plus, s'il a la faculté d'assister aux mariages, le diacre à le pouvoir de dispenser dans les cas occultes plusieurs empêchements découverts dans une situation *omnia parata*[71], conformément aux conditions stipulées dans le c. 1080, § 1.

Il y a certains autres pouvoirs exécutifs qui peuvent être octroyés au diacre par l'Évêque, selon la mission canonique qui lui est confiée. Le plus notable parmi ceux-ci est sans doute celui d'administrateur paroissial. Même si le sacerdoce ministériel est nécessaire à l'existence même de la communauté en tant qu'Église[72], le c. 517, § 2 permet, en cas d'une pénurie de prêtres, l'Évêque diocésain de confier à un diacre ou à un fidèle laïc le soin pastoral d'une paroisse sous l'autorité d'un prêtre modérateur. L'exercice d'une telle charge pastorale peut comporter la délégation de certaines facultés juridictionnelles[73] (l'accord de diverses dispenses, permissions, une commutation, etc.) surtout dans le cas où le prêtre modérateur est retraité ou bien qu'il a un ou plusieurs autres apostolats[74]. La préférence qu'établit ce canon en faveur du diacre n'est pas à négliger[75] : celle-ci semble rejoindre les cc. 129 et 274, § 1 concernant la capacité et le droit juridique général du diacre, en tant que clerc, à se voir confier une fonction comportant l'exercice du pouvoir de gouvernement[76].

[71] Littéralement, « tout est prêt ». Une telle situation survient lorsque « tout est prêt » pour le mariage et qu'un empêchement est découvert mais qu'il est trop tard pour s'adresser à l'autorité compétente pour obtenir la dispense requise et qu'il y a un danger probable de dommage sérieux à retarder le mariage.

[72] Voir CONGRÉGATION POUR LE CLERGÉ et al., Instruction sur la collaboration des fidèles laïcs au ministère des prêtres *Ecclesiae de mysterio*, 15 août 1997, dans AAS, 89 (1997), pp. 852-876, *Ecclesiae de mysterio*, Introduction, n° 3 (= *Ecclesiae de mysterio*).

[73] À titre d'exemples, voir *CIC*, cc. 1071, § 1, n° 1-3, 4, § 2 ; 1080, § 1 ; c. 1245 ; c. 1196, n° 1 ; 1203.

[74] Voir CIC, c. 336 ; aussi HUELS, *Empowerment for Ministry*, p. 166.

[75] *Cf. Ecclesiae de mysterio*, article 4.

[76] *Cf.* DITEWIG, *The Emerging Diaconate*, pp. 211-217.

Quant à la participation de l'ordre des diacres aux structures diocésaines de gouvernement, malgré le fait que l'incorporation des diacres en *ordo* est centrale à sa sacramentalité[77], l'enseignement conciliaire fait ressortir à quel point l'ordre diaconal n'est pas une structure collégiale comme celui de l'épiscopat et du presbytérat. L'ordre diaconal n'est pas appelé à former un collège dans lequel, peut être exercé un pouvoir de gouvernement suprême et plénier sur l'Église tout entière comme, le Collège des Évêques[78].Non plus est-il appelé par la loi de constituer un conseil auprès de l'Évêque diocésain pour agir comme son sénat et de l'aider dans le gouvernement de son diocèse, comme le conseil presbytéral (*CIC*, c. 495, § 1).

2.4.2 — *Participation à l'exercice du pouvoir législatif*

Comme il a été mentionné dans la première section, le pouvoir législatif est réservé au Pontife Romain et au Concile Oecuménique pour l'Église universelle et, à l'intérieur de leur domaine de compétence, aux conciles particuliers et aux conférences des évêques pour les Église particulières de leur ressort et à chaque évêque diocésain dans son diocèse. Le c. 135, § 2 précise que seule l'autorité suprême de l'Église peut validement déléguer ce pouvoir à une autre personne. Or, en dehors d'un tel cas exceptionnel, le diacre ne peut exercer le pouvoir législatif.

2.4.3 — *Participation à l'exercice du pouvoir judiciaire*

En tant que clerc, le diacre, s'il a les qualités requises (*CIC*, 149, § 2), peut être nommé juge ecclésiastique (*CIC*, c. 1421, § 1). En tant que juge, il a le pouvoir de prononcer des sentences et d'émettre des décrets reliés aux causes qui lui sont présentées par l'entremise du Vicaire judiciaire. Il peut même siéger en tant que juge unique dans une cause (*CIC*, c. 1425, § 4), ce qui, étrangement, n'est pas permis au juge laïc (*CIC*, c. 1421, § 2). Tenant compte des propriétés du pouvoir de gouvernement dans l'Église élaborées au premier chapitre, cette restriction semble juridiquement incohérente et contraire à la tradition canonique[79]. En effet, il a déjà été établi que le

[77] Pour une étude approfondie de la question de la sacramentalité du diaconat, voir CTI, chapitre 4, p. 55-75 ; voir aussi BORRAS, *Le diaconat au risque de sa nouveauté*, pp. 85-110.

[78] Voir D. GONNEAUD, « La sacramentalité du ministère diaconal », dans *Revue théologique de Louvain*, 36 (2005), pp. 15-16.

[79] Voir HUELS, « The Power of Governance », pp. 72-73. Aussi, c*f*. L. ÖRSY, « Lay Persons in Church Government ? A Disputed Question », dans *America*, vol. 174, n° 11 (1996), pp. 10-13.

pouvoir exercé par le juge diacre et le juge laïc est de même nature et provient de la même source, soit par provision canonique de la part d'une autorité compétente (l'Évêque diocésain). Cette distinction semble reposer sur le c. 274 qui donne au diacre un droit à être nommé à un office qui comporte l'exercice du pouvoir de gouvernement dont ne jouit pas le fidèle laïc. Remarquons que la norme actuelle relève du droit ecclésiastique, et pourrait donc être changée dans le futur.

Conclusion

Le *Code de droit canonique* de 1983 établit clairement qu'en vertu du sacrement de l'Ordre et de la loi universelle, le diacre jouit avec le presbytre et l'évêque d'une capacité juridique générale à exercer le pouvoir de gouvernement dans l'Église. De plus, il a généralement préséance sur le laïc à recevoir des offices ecclésiastiques requérant l'exercice de ce pouvoir. Cette capacité juridique est, par contre, en réalité considérablement limitée par le fait que l'ordination diaconale ne confère pas le sacerdoce ministériel qui habilite à la présidence eucharistique et ecclésiale.

L'analyse des canons ci-dessus permet de confirmer que même si la participation du diacre à l'exercice du pouvoir de gouvernement demeure assez clair à cerner au niveau juridique, l'actuelle herméneutique théologique du pouvoir étant articulée exclusivement en termes sacerdotaux fait en sorte que les fondements théologiques, surtout en ce qui attraits à la *sacra potestas*, de cette participation demeurent difficiles à cerner au plan théologique. Un travail considérable demeure à faire au niveau de la réflexion théologique des ministères afin de mieux inscrire la participation du diacre au pouvoir ecclésiastique non plus en comparaison des autres ministères ordonnés ou encore aux fidèles laïcs mais plutôt au niveau de la portée théologique unique qu'elle apporte envers l'accomplissement de la mission de l'Église.

Au terme de cette étude, il devient plus facile de comprendre pourquoi, le ministère du diaconat, au point de vue de sa signification théologique et de son rôle ecclésial, continue de constituer aujourd'hui un défi pour la conscience et la pratique de l'Église. La présence progressivement marquée de diacres dans la participation à l'exercice du pouvoir de gouvernement dans l'Église continuera à pousser les théologiens et les canonistes à clarifier la doctrine traditionnelle du pouvoir, fondée entièrement sur une théologie du sacerdoce ministériel, ainsi que la législation canonique concernant le fonctionnent du pouvoir ecclésiastique. Chose certaine, le diaconat continuera à remettre en

question un bon nombre de notions longuement établies au sujet du ministère ordonné, surtout sa relation avec le pouvoir. Une compréhension doctrinale plus élargie du pouvoir sacré pourrait contribuer à mieux cerner l'identité du diacre dans l'Église ainsi que de faire valoriser davantage la vocation diaconale de l'Église entière. Comme l'affirme la réflexion théologique récente, pour comprendre la participation du diacre au pouvoir de gouvernement, il faut écarter une théologie de pouvoir au profit d'une théologie du service et de relation avec les autres ordres et le peuple de Dieu dans son ensemble.

Au plan canonique, un tel éclaircissement doctrinal pourrait éventuellement s'exprimer par un traitement plus systématique du diaconat comme ordre distinct du ministère hiérarchique plutôt que comme des exceptions aux normes des presbytres. Quant aux normes reliées au pouvoir de gouvernement, la participation spécifique du diacre pourrait se voir davantage précisée de manière que l'attribution de certains pouvoirs de gouvernement au diacre soit vu comme une habilitation pour mieux servir la communauté ecclésiale en tant que signe sacramentel du Christ Serviteur et animateur de la diaconie dans l'Église. De cette manière, l'aspect kénotique du pouvoir sacré se verrait alors attribué la juste part qui lui revient. Un nouvel encadrement juridique du pouvoir de gouvernement permettrait de mieux distinguer au niveau du droit universel entre les offices ecclésiastiques de gouvernement pastoral qui requiert absolument le sacerdoce ministériel et ceux qui ne le requiert pas mais qui sont présentement limités aux presbytres, notamment celui de vicaire judiciaire.

Finalement, on peut constater que même si le ministère diaconal est d'abord et avant tout appelé au service, cela ne signifie pas qu'il lui est interdit d'exercer un leadership pastoral dans l'Église. Au contraire, c'est au cœur de sa mission. On peut dire que le diacre, en tant que ministre ordonné, est appelé à participer d'une manière ordinaire et permanente au soin pastoral du peuple de Dieu mais que ce soin là n'est pas sacerdotal. Son ministère diaconal peut l'amener à participer à l'exercice du pouvoir de gouvernement dans l'Église mais que cela est toujours fait dans une perspective de service et d'assistance à la charge présidentielle des autres ministères ordonnés. Ceci étant dit, ce serait une erreur monumentale de réduire l'apport du diaconat à la mission de l'Église à une simple question de pouvoir. Sa plus grande richesse demeurera toujours sa signification christique et ecclésiologique particulière, soit d'être dans et pour l'Église « l'icône vivante du Christ serviteur »[80].

[80] *Normes fondamentales*, 11.

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THE DEVELOPMENT OF CIC CANON 1342 §1 AND ITS IMPACT UPON THE USE OF THE EXTRA-JUDICIAL PENAL PROCESS

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SUMMARY — The author discusses the legislative history of canon 1342 §1. This canon implies the preferential option for the judicial process for the imposition of penalties even as it indicates when an extra-judicial process may be used. In the development of the canon there were certain changes and omissions of the original draft but these provisions were largely retained in the Code of Canons of the Eastern Churches. Further, commentators have noted these provisions would have better provided for objectivity of judgment. However, these lost elements could well guide the ordinary in determining when there are truly just causes standing in the way of the judicial trial and recommending the extra-judicial process. The author hopes that any revision of Book VI will enhance the objectivity of the penal process.

RÉSUMÉ — L'auteur discute de l'histoire législative du canon 1342 §1. Le canon en question témoigne d'une option préférentielle pour le processus judiciaire dans l'imposition de sanctions et ce même s'il précise à quel moment on peut recourir à un processus extra-judiciaire. En retraçant l'évolution du canon on note que certaines modifications ont été apportées au texte original. Mais on constate également que la plus grande partie des dispositions touchées ont été conservées dans le Code des canons des Églises orientales. En outre, d'après certains commentateurs on aurait pu mieux pourvoir à ces dispositions pour garantir l'objectivité du jugement. Ceci dit, ces éléments pourraient bien aider l'ordinaire à déterminer les circonstances où de justes causes constituent un obstacle à la tenue d'un procès judiciaire, de même qu'à recommander le recours à un processus extra-judiciaire. L'auteur espère que toute révision du Livre VI fera mieux valoir l'importance de l'objectivité du processus pénal.

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Introduction

Canon 1342 §1 of the 1983 Code of Canon Law speaks about the decision of the ordinary concerning which process to use when imposing canonical penalties. The canonical tradition of the preferential option for the judicial process has been changing with the praxis of the Congregation for the Doctrine of the Faith in handling claims of sex abuse of minors by clergy. This preferential option seems to be eroding further with the advent of the special faculties of the Congregation for the Evangelization of Peoples[1] and of the Congregation for the Clergy.[2] Finally, those who have seen the proposed revision of Book VI of the 1983 Code have noted that the Pontifical Council for Legislative Texts seems to be recommending a more frequent and regularized use of the extra-judicial process for the imposing of canonical penalties including perpetual penalties.

This study intends to explore the legislative history of canon 1342 §1 and then to suggest the circumstances which should be in place before the extra-judicial process is used for imposing penalties. It shall also consider what the rather different approach of the Code of Canons of the Eastern Churches might say to us about this same matter. This study does not concentrate on the history of canon 1342 §2 which addresses the fact that perpetual penalties may not be imposed by way of the extra-judicial decree. There were no significant changes in this provision throughout its legislative history. Yet, as we know, in recent times exceptions to this principle have been very frequent.

1 — *The Legislative History of Canon 1342 §1*

In the fall of 2012 I spent considerable time researching the development of penal law by studying the archives at the Pontifical Council for Legislative texts. The development of canon 1342 §1 quickly became interesting to me.

There were nine questions which Pio Ciprotti, the relator of the *coetus de delictis et poenis*, put to the consulters in 1966 regarding *De poenis in genere*. The ninth question is relevant for our discussion. It was phrased in this way: *Utrum utilius sit poenas per sententias in iudicio irrogari vel*

[1] CONGREGAZIONE PER L'EVANGELIZZAZIONE DEI POPOLI, "Lettera riservata Prot. 0579/09, del 31/01/09."

[2] CONGREGAZIONE PER IL CLERO, "Lettera riservata Prot. 2009.0556, del 18/04/09."

declarari, an per praecepta extra iudicium? (Whether it is more useful for penalties to be imposed or declared through sentences or through extra-judicial precepts?)

It might be helpful for us to consider briefly the written opinions of three of the consulters regarding question nine, namely, William O'Connell, O.F.M., then the defender of the bond of the Apostolic Signatura, Mark Said, O.P., professor of canon law at the Pontifical University of St. Thomas *in Urbe* (*Angelicum*) and Peter Huizing, S.J., professor of canon law and history of canon law, Catholic University of Nijmegen, The Netherlands.[3]

William O'Connell argued that it is often necessary to impose penalties or to declare penalties in a quicker fashion. Thus, he was in favor of a wider use of the extra-judicial procedure.

Mark Said was more nuanced in his approach. He stated that in his view the judicial process is better suited to those situations wherein the delict is already known to the public and scandal has arisen because the judicial trial offers better protections for the correct administration of justice and for the defense of the accused. On the other hand, if the delict is public in nature but not yet actually known, it would be better to apply a penalty *per praeceptum et via administrativa* so as to avoid scandal but as long as there are precautions to provide for the defense of the accused.

Peter Huizing gave a very lengthy and somewhat rambling opinion. In general, he seemed to be more in favor of imposing penalties by way of a trial. On the other hand, he wondered whether or not the administrative method might better correspond to modern conditions. For example, he observed that many people are affected by religious indifferentism and liberalism and many Catholics are simply non-practicing. As a consequence, he said that it might be almost impossible that such people would be willing to appear before a judge.

Huizing also noted that normal diocesan judges really were not sufficiently prepared and knowledgeable for the handling of penal trials. However, he also noted that the same might well have been said for the hierarchical superior who would be charged to conduct an extra-judicial process. In the new law, both the judicial and the administrative procedures should be more precisely described in terms of form, scope and limits. In his opinion the new law should be able to taxatively determine the limits between the two processes, but the judicial process should always

[3] These reports of opinions of consulters are taken from the archives of the Pontifical Council for Legislative Texts. Gradually, the Pontifical Council for Legislative Texts is publishing the entire deliberations of the *coetus de delictis et poenis* in *Communicationes*.

be required for more serious delicts. Concerning the administrative procedure, the law should more clearly indicate which superior would be competent to impose a penalty by decree. In this process, the law should determine how self-defense takes place. Further, there should be norms concerning witnesses and the use of experts as well as norms concerning the evaluation of evidence.

In 1973 the Code Commission published for consultation purposes a *schema* containing the proposals for penal law.[4] However, I should note there were two previous *schemata* produced by the members of the *coetus*: one shortly after the Code Commission began its work in earnest after the First Synod of Bishops which, as we recall, determined the ten basic principles for the reform of canon law. Also, there was another such *schema* produced early in January 1970. These earlier texts of the pertinent provision of law on this matter were the same as the text of canon 28 in the 1973 *Schema* published for consultation. Let us compare the text in the 1973 *Schema* with the text in the 1983 Code. I shall use the Latin texts for comparisons in this study:

1973 *Schema De sanctionibus*	**1983 Code of Canon Law**
Canon 28 — §1. Quoties **graves** obstent causae ne iudicialis processus fiat, **et probationes de delicto evidentes sint neque actio criminalis sit exstincta,** poena irrogari vel declarari potest per decretum extra iudicium; paenitentiae autem et remedia poenalia applicari possunt per decretum in quolibet casu.	Canon 1342 — §1. Quoties **iustae** obstent causae ne iudicialis processus fiat, poena irrogari vel declarari potest per decretum extra iudicium; remedia poenalia autem et paenitentiae applicari possunt per decretum in quolibet casu.

I have highlighted in bold the texts in canon 28 of the 1973 *Schema* which later were either changed or eliminated. We note above that the adjective, *graves*, was later changed to *iustae*. This change will be discussed at length below.

Let us now look into the discussion of the *coetus* about the changes in this provision which came about in 1977. In the first column below you will

[4] PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Schema documenti quo disciplina sanctionum seu poenarum in Ecclesia latina denuo ordinatur*, Civitate vaticana, Typis polyglottis Vaticanis, 1973 [= 1973 *Schema*].

see canon 28 of the 1973 *Schema*. As we look to the next column (1977 *Schema* canon 32) we see that eliminated were the words *et probationes de delicto evidentes sint neque actio criminalis sit exstincta*.[5]

1973 *Schema De sanctionibus*	**1977 *Schema De sanctionibus***
Canon 28 — §1. Quoties **graves** obstent causae ne iudicialis processus fiat, *et probationes de delicto evidentes sint neque actio criminalis sit exstincta,* poena irrogari vel declarari potest per decretum extra iudicium;	Canon 32 — §1. Quoties ***graves*** obstent causae ne iudicialis processus fiat, poena irrogari vel declarari potest per decretum extra iudicium;

There was considerable discussion on this canon in a meeting of the *coetus de delictis et poenis* on 13 January 1977. It is clear two positions were in conflict: the position of those who thought the administrative procedure should never be used to apply penalties and those who thought what we now call the extra-judicial process should be used more frequently.

According to the archives, the consulters indicated they were well aware of the goal of the proposition not to allow penalties to be applied administratively, namely, that greater justice would be achieved using the judicial method. Nevertheless, the consulters thought that a proposal never to use an extra-judicial process was unrealistic because at this time the Church needed what they referred to as "an agile and expeditious instrument" for the application of penalties, namely, the administrative or extra-judicial process. They noted that the way the canon was written continued to make clear the preference of the Legislator for the judicial method.

It was interesting to read that one consulter wanted the redaction of the canon to be changed so that there would be no stated preference for the judicial method. In other words, this consulter proposed that either the judicial method or the administrative method could be used equally in law for the application of penalties. This proposition, however, did not please the other consulters. Unfortunately, the text of the archival material does not provide a discussion of the rationale. However, it is easy to see that this proposal was diametrically opposed in every way to the long-standing preference for the judicial process for imposing penalties. In any

[5] The blank space in the text in the table recalls the elimination of "*et probationes de delicto evidentes sint neque actio criminalis sit exstincta.*"

event, at that point in the discussion the redaction of this canon remained as it was.[6]

1.1 — Concerning the Elimination of *"et probationes de delicto evidentes sint"*

In this discussion one of the consulters who seemed to favor the use of the administrative method stated that the phrase *et probationes de delicto evidentes sint* could be eliminated. His rationale was that in the new Code there would be norms concerning administrative procedure which would offer precautions equivalent to those established in the judicial procedure. However, as we know, the canons on administrative law and process were drastically reduced in the final product. Apparently, there was no thought about revisiting this canon when that new direction concerning administrative law became evident.

We might have some questions about the intended purpose of this phrase, *et probationes de delicto evidentes sint*. Was it a condition to be verified before the ordinary could decide to use the extra-judicial decree for imposing a penalty or was it simply a statement that the ordinary would have to have evident proof of the commission of a delict before he could impose a penalty by decree?

To answer this question it would be helpful to compare the extra-judicial method with the judicial method. This phrase could simply be a repetition in the case of an extra-judicial decree of the norm contained in canon 1608, §1 of the current Latin Code, namely, "For the pronouncement of any sentence, the judge must have moral certitude about the matter to be decided by the sentence." However, it would seem redundant for this canon (c. 28, 1973 *Schema*) to repeat for the extra-judicial process what is already required for the judicial process. In the canon of the *CIC* which addresses how the extra-judicial process is to be carried out, namely canon 1720, 3º, the requirement of certainty is also mentioned. In the *CCEO,* the canons on imposing penalties by extra-judicial decree (cc. 1486-1487) and the general canons on the procedure for issuing extra-judicial decrees (cc. 1517-1520) do not mention the requirement of achieving moral certitude. The Eastern Code apparently presumes the superior knows he must follow the requirement

[6] "[Unus consultor] vellet redactionem canonis mutare ita ut dispareat illa praeferentia pro via iudiciali et appareat sive viam iudicialem sive viam adminstrativam aequo iure sequi posse in applicandis poenis. Haec tamen propositio aliis Consultoribus non placet, ideo redactio huius canonis manet prouti est." Adunatio diei 13/1/1977, p. 15, in the archives of the Pontifical Council for Legislative Texts.

of having moral certitude which is required for definitive sentences (*CCEO* c. 1291 §1).

Considering the wording of the entire canon and especially the opening word, *Quoties*, this phrase about the necessity of evident proofs appears more likely to be one of three conditions which must be verified *before* the extra-judicial process may be used, namely:

- presence of grave obstacles standing in the way of using the judicial process;
- presence of evident proofs;
- *actio criminalis* which is not extinct because of prescription.

I do not think that the decision of the *coetus* to remove the phrase *et probationes de delicto evidentes sint* was motivated by a belief that actually having such evident proofs beforehand from a preliminary investigation was unnecessary. Rather, from the discussion found in the archives the *coetus* believed that it was not necessary to actually specify in this canon such a condition because there would be precautions to address this matter to be found in the new administrative law. At that time in the revision process much work was already going on in drafting a new administrative law and administrative process. I shall return later to the usefulness of this omitted phrase when I speak of the idea of "best practices" in using the extra-judicial process.

Thus, canon 28 of the 1973 *Schema* seems to be referring to the presence at this point of these evident proofs which appear to be able to bring one much closer to the truth than those facts which simply provide the *fumus boni iuris* for a trial. After the ordinary institutes the extra-judicial process, he is to do what further is needed in order that these *probationes evidentes* are substantiated so that moral certitude can be reached.

1.2 — Concerning the change from "grave causes" to "just causes"

We know that canon 1342 §1 requires only "just causes" standing in the way of using the judicial process before the ordinary may choose to use the extra-judicial process. Hence, at some point, there was a change in the wording of the canon from "grave causes" to "just causes."

As already noted, the 1973 *Schema* required there to be ***grave*** causes actually standing in the way of using the judicial process. Further, there was the later June 1977 *Schema* which also retained the requirement of "grave causes." The following table compares canon 32 of the 1977 *Schema* with canon 1294 of the 1980 *Schema*. It is important to note that

the change from *graves causae* to *iustae causae* was first seen in the 1980 *Schema*:[7]

1977 *Schema*	**1980 *Schema***
Canon 32 — §1. Quoties ***graves*** obstent causae ne iudicialis processus fiat, poena irrogari vel declarari potest per decretum extra iudicium;	Canon 1294 — §1. Quoties ***iustae*** obstent causae ne iudicialis processus fiat, poena irrogari vel dcclarari potest per decretum extra iudicium;

A thorough search of the archives of the Pontifical Council for Legislative Texts—the bound copies of the original archival material as well as the original materials themselves—has revealed no reports about the activity of the *coetus de delictis et poenis* after the June 1977 meeting. At some point between the end of that meeting and the publication of the 1980 *Schema* for the revised code the text was changed from *Quoties graves obstent causae ne iudicialis processus fiat* to *Quoties iustae obstent causae ne iudicialis processus fiat*. Inquiries made with a number of canonists and curialists in Rome did not yield any answers about how this change came about. There were some speculations offered but most could not be substantiated. Perhaps, only by finding and studying the personal papers of either the relator or one of the members of the *coetus de delictis et poenis* could one discover what happened after the last reported meeting of the study group and the publication of the 1980 *Schema*. This would be another research project.

However, a review of the summaries of the international consultations which took place after the publication of the 1973 *Schema* revealed that many of the responders were unclear what was meant by "grave causes" and were asking for clarification. As mentioned earlier, one of the consulters in January 1977 was trying to foster the idea that the extra-judicial process and the judicial process should be considered on an equal footing in the law. As also mentioned, those who were in favor of using the extra-judicial process saw it as that "agile and expeditious instrument" more suited for modern times. These opinions may likely have been the influence behind the adoption of the wording, "just causes." However, it remains strange there is no documentation for the change to be found in the archives of the Pontifical Council.

[7] PONTIFICIA COMMISSIO CODICIS IURIS CANONICI RECOGNOSCENDA, *Schema Codicis Iuris Canonici, iuxta animadversiones S.R.E. Cardinalium, episcoporum conferentiarum, dicasteriorum curiae romanae, universitatem facultatumque ecclesiarum necnon superiorum institutorum vitae consecratae recognitum*, Civitate vaticana, Libreria editrice vaticana, 1980 [= 1980 *Schema*].

There was another phrase which was discussed and then removed by the *coetus* in their meeting of 13 January 1977, namely, *neque actio criminalis sit exstincta*. The same consulter who had recommended the omission of the phrase about the proofs also recommended the elimination of this phrase about non-extinct criminal action. The archives do not reveal the rationale for the suggestion. However, it seemed to have been approved by all present. As we know, this same phrase appears in the 1983 Code, canon 1720, 3º: *si de delicto certo constet neque actio criminalis sit extincta*[8]*, decretum ferat ad normam cann. 1342-1350, expositis, breviter saltem, rationibus in iure et in facto*. Thus, this provision simply was moved from penal law into procedural law.

2 — *Commentary on the History of the Framing of Canon 1342 §1*

Since the promulgation of the 1983 Code of Canon Law there has been discussion by some authors concerning the redactional journey which led to our present canon 1342 §1. For example, Velasio De Paolis in more than one place has pointed out how at the beginning of the journey there was a strong emphasis on the principle that the judicial process was favored as the more secure process for the pursuit of justice and for the protection of the rights of the faithful. Then, gradually as time went on, he noted, this conviction seemed to disappear as is reflected in the changing of the wording of the canon. He admits that the wording of canon 1342 §1 still seems to hold that the judicial process remains privileged in the law, but in reality he does not see it as remaining privileged in practice in the law. He acknowledged in his article that there would certainly be just causes for using the administrative process. However, as he notes, although canon 1718, §2 states the ordinary has the faculty to consult two judges or other experts of the law, "if he considers it prudent," nevertheless the ordinary remains the sole judge of this matter.[9]

Velasio De Paolis and Davide Cito in their commentary on Book VI issued originally in 2000 and reprinted in 2008 also commented on the

[8] Author's note: the source documents use differing spellings of the Latin word for "extinct."

[9] Velasio DE PAOLIS, "Il processo penale in nuovo Codice," in Z. GROCHOLEWSKI and V. CARCEL ORTI (eds.), *Dilexit Iustitiam: Studia in Honorem Aurelii Card. Sabattani*, Città del Vaticano, Libreria editrice vaticana, 1984, pp. 486-489. See also Velasio DE PAOLIS, "L'applicazione della pena canonica," *Monitor Ecclesiasticus*, 114 (1989), pp. 89-92; Andrea D'AURIA, "La scelta della procedura per l'irrogazione delle pene," in *Questioni Attuali di Diritto Penale Canonico*, Studi Giuridici 96, Città del Vaticano, Libreria Editrice Vaticana, 2012, pp. 115-116.

journey of canon 1342 in the section on *La via amministrativa*.[10] However, in order to put that discussion in proper perspective, they first addressed the fact that in the judicial trial the promoter of justice and the accused with his advocate are the two parties. The trial establishes a debate between the two positions. The judge (or judges) is (are) above the parties. From this debate there emerges or is supposed to emerge the truth which is pronounced by the judge(s). However, in the human condition, these authors continue, truth does not always easily emerge; and so our judicial process provides for the appeal. The appeal is judged by different judges. Thus, the judicial process is marked by objectivity and independence. On the other hand, they note that in the administrative or extra-judicial process not only are the formalities much reduced but this process does not properly establish the dialectical relationship between the two parties and does not guarantee the objectivity in the pronouncement concerning the truth.[11] In this process, the judge who is the ordinary is not procedurally positioned above the parties but is actually one of the parties: the ordinary is the judge, a party and the superior. This strong potential for conflict of interest was well emphasized by William Richardson in his presentation to this body at Edinburgh in May 2012.[12]

Concerning the preparation of canon 1342 §1, De Paolis and Cito also note the fact that the earlier *schemata* strongly supported the notion of the privileged position of the judicial process as the Church's method of applying penalties. However, they also note that with subsequent *schemata* this position was weakened to the point where it became practically a formality. Simply by replacing of the words *graves causae* with *iustae causae* without any other qualification, it became very easy to find just causes for avoiding the use of the judicial penal process. They note that the importance of the judicial process is maintained in the Code, however, because perpetual penalties can only be applied after a judicial trial has determined the violation of a law or precept with imputability and determined that such a penalty is in proportion to the crime committed.[13]

In commenting of the evolution this canon, Claudio Papale noted that the term *iustae causae* is essentially vague and susceptible to any content that

[10] Velasio DE PAOLIS and Davide CITO, *Le Sanzioni nella Chiesa*, Città del Vaticano, Urbaniana University Press, 2008, pp. 241-248.

[11] Ibid., p. 242.

[12] William RICHARDSON, "An Appalling Vista? The Future of Judicial Penal Trials in The Latin Code," *Canon Law Society of Great Britain and Ireland Newsletter*, 173 (March 2013), pp. 49-59.

[13] De PAOLIS and CITO, p. 243.

the ordinary would like to give it. He further notes that canon 1718 §3 emphasizes that the ordinary truly is the sole judge of this matter and is not required to have the assistance of the two judges or experts in the law to help him to form his judgment on the matter of the choice of the process; but he only is to use them if he deems it prudent.[14]

As can be seen, there seems to be some unanimity among the commentators as they reflect on the development of canon 1342 §1. They have raised serious questions about the structure of the extra-judicial process as well as about the structure of the decision-making process for determining what penal process to use. In both instances, their serious concerns are in the area of the objectivity of these decisions.

3 — *A Reflection upon How the Eastern Code Addresses the Decision about What Penal Process to Choose*

We might wonder in our discussion what approach did the framers of the Eastern Code take with regard the juridic processes for the application of ecclesiastical penalties. Let us look at the two Codes in comparison:

1983 Code of Canon Law	1990 Code of Canons of the Eastern Churches
Canon 1342 — §1. Quoties iustae obstent causae ne iudicialis processus fiat, poena irrogari vel declarari potest per decretum extra iudicium; remedia poenalia autem et paenitentiae applicari possunt per decretum in quolibet casu.	Canon 1402 — §2. Si vero iudicio auctoritatis, de qua in §3, graves obstant causae, ne iudicium poenale fiat, et probationes de delicto certae sunt, delictum puniri potest per decretum extra iudicium ad normam cann. 1486 et 1487, dummodo non agatur de privatione officii, tituli, insignium aut de suspensione ultra annum, de reductione ad inferiorem gradum, de depositione vel de excommunicatione maiore.

CCEO canon 1402 §2 incorporates into the same section the limitations for the use of the extra-judicial process which is addressed in *CIC* canon 1342

[14] Claudio PAPALE, *Il Processo Penale Canonico: Commento al Codice di Diritto Canonico, Libro VII, Parte IV*, Vatican City, Urbaniana University Press, 2012, pp. 70-71.

§2, although some specific limitations are different. What is important here is to emphasize that the *CCEO* has substantively retained the phrases which were gradually removed from the *schemata* leading up to canon 1342 §1. The comparison below helps to illustrate the similarities between *CCEO* canon 1402 §2 and 1973 *Schema* canon 28 found in the development of the 1983 Code of Canon Law:

1973 *Schema De sanctionibus*	**1990 *CCEO***
Canon 28 — §1. Quoties ***graves obstent causae*** ne iudicialis processus fiat, ***et probationes de delicto evidentes sint*** neque actio criminalis sit exstincta, poena irrogari vel declarari potest per decretum extra iudicium;	Canon 1402 — §2. Si vero iudicio auctoritatis, de qua in §3, ***graves obstant causae***, ne iudicium poenale fiat, ***et probationes de delicto certae sunt,*** delictum puniri potest per decretum extra iudicium ad normam cann. 1486 et 1487, dummodo non agatur de privatione officii, tituli, insignium aut de suspensione ultra annum, de reductione ad inferiorem gradum, de depositione vel de excommunicatione maiore.

It is interesting to note that the principles directing the framing of the Eastern Code stated that all Catholics should observe the same procedural norms.[15] Thus, it seems that the framers of *CCEO* canon 1402 §2 who were obviously well aware of *CIC* canon 1342 §1, made a very conscious decision *not* to take the same approach as the 1983 Code. Although there is a strong similarity between the 1973 *Schema* and the provision in the *CCEO*, one notes there was a slight but not substantial change in the wording from the 1973 *Schema*, canon 28 §1: *probationes evidentes* was changed to *probationes certae* in *CCEO* canon 1402 §2. Perhaps, this change was taken from the aforementioned January 1977 discussion of the *coetus de delicts et*

[15] *Nuntia* 3 p. 9: "2. Si desidera che tutti i cattolici abbiano le stesse norme processuali;" and *Nuntia* 3, p. 23: "In 'de iudicis' one thing only is important, notably, That the administration of justice be perfectly proportioned to the real state of things, to the conditions of the individuals involved and of the ecclesiastical society. In this respect, the *motu proprio Sollicitudinem Nostram* already constitutes an excellent Code, well-adapted to the present conditions of the Orietnal Catholic Churches. However, the canons relative to procedure should be improved by the introduction of some changes intended to reflect the particular structure of these Churches as well as by the simplification of the canonical procedures themselves. It is desired that all Catholics observe the same procedural norms."

poenis for the Latin Code during which one of the consulters had recommended such a change before the whole phrase was actually removed from the canon.

I believe that it is important for us to be aware that those in the Catholic Church who breathe with the other lung[16] believed strongly that *grave* causes would have to stand in the way of using the judicial trial before the extra-judicial method could be considered. Also, they believed that the proofs for the existence of the delict would have to be certain before beginning such a procedure.

The purpose of my reflecting on the law for the Eastern Churches in this matter was not to suggest that we simply can follow the Eastern law in the Latin Church. However, since the provisions of *CIC* canon 1718, §1, 3º,[17] give very little direction to the ordinary in making his decision about what penal procedure to use, nothing would stand in the way of his taking into consideration the values behind *CCEO* canon 1402 §2 in making that important decision. Further, since "the ordinary is to hear two judges or other experts of the law if he considers it prudent,"[18] those advisors in preparing their suggestions to the ordinary regarding the choice of the penal process might well be guided by the "wisdom of the East."

4 — *Some Suggestions about Implementing Canon 1342 §1*

I believe that what has been discussed above should have something to say about how the ordinary and his advisors might best decide in choosing a penal procedure. But we first need to consider always the provisions of canon 1341. This canon states quite emphatically that it is illicit to apply penalties if "fraternal correction or rebuke or other means of pastoral solicitude" will actually achieve the three-fold goal, namely, sufficient repair of the scandal, restoration of justice, reformation of the offender. At the same time, as sad experience has told us, failure to determine whether or not there was an imputable violation of a law or precept and then to apply the appropriate penalties has led to the discrediting of Church authorities and of the Church itself in many instances. In the past, there was often the mistaken

[16] A reference to an expression found in the apostolic constitution of Pope John Paul II, *Sacri Canones*.

[17] See canon 1718, §1, 3º on whether a judicial process must be used or, unless the law forbids it, whether the matter must proceed by way of extrajudicial decree.

[18] Canon 1718, §3.

notion that there was an inherent conflict between the pastoral dimension of the Church and the use of penal or criminal law.[19]

One of the most important things to remember about c. 1342, §1 is that it does not define the question in this way, namely, whether or not the extra-judicial process would seem *preferable* in a given situation. Rather, the canon states that just causes must actually *stand in the way*—form a just obstacle—to using a judicial trial in order to establish moral certitude of legal violation and of its imputability as well as to apply an appropriate penalty, if the crime is established. Simply basing a decision on what process might be more convenient would be to follow the position of the consulter who proposed unsuccessfully that the two processes should be considered *aequo iure* in the law. We remember that his position was soundly rejected and did not affect the basic position of the preferential option for the judicial process.

In discussing the use of the extra-judicial process under the Pio-Bendictine Code (c. 1933, §4), Claudio Papale has noted that this administrative process must achieve moral certitude before applying a penalty. This moral certitude includes not only the certainty that a law or a precept has been violated but also that the violation is imputable to the perpetrator.[20] However, when discussing what is a "just cause" standing in the way of using the judicial process according to c. 1342, §1, Papale states that authentic doctrine indicates what is the substance of a "just cause." He quotes the relator of the *coetus de delictis et poenis*, Pio Ciprotti,[21] who stated that such a cause would exist when the one who is suspected of violating the law in question has not actually denied committing the violation or to have been responsible for doing so. In such a case, the requirements for certitude in a decision have been achieved. Therefore, it would seem superfluous to expend the resources necessary for the judicial process. Also, if the alleged offense had not become public, and was unlikely to become public, it would then be inadvisable to initiate a trial which operation could neutralize any effort to avoid harm to the society, the repair of which is one of the three

[19] PONTIFICIUM COUNCILIUM PRO TEXTIBUS LEGISLATIVIS, *Schema recognitionis Libri VI Codicis iuris Canonici (Reservatum)*, Civitate vaticana, Typis polyglottis, 2011, Praenotanda, p. 5: "Opinatio iuxta quam systematis poenalis applicatio componmi nequit cum caritate ab actione pastorali requisita est error sat diffusus in hodiernis Ecclesiae adiunctis, et quidem intra ampliorem ambitum despectionis—qui est quoque defectus debitae formationis—erga aspectum iuridicum Ecclesiae."

[20] PAPALE, *Il Processo Penale Canonico: Commento al Codice di Diritto Canonico, Libro VII, Parte IV*, pp. 75-76.

[21] *Ibid*., p. 72.

goals for the penal process. Further, conducting a trial could also cause unnecessary damage particularly to the reputation of the person alleged to have perpetrated the action if he really was innocent of the crime.[22]

In his recently published *Formulario*, Papale, commenting on the ordinary's decisions required by canon 1718, also argues similarly about when there would be a just cause for choosing the extra-judicial process. He gives an example of a just cause: when the person being investigated in the preliminary investigation recognizes his own fault and declares himself as responsible for the delict attributed to him. Papale argues that in such a situation it would be superfluous to set in motion the judicial process with all the resources necessary for it. He also notes that in such a case there would not likely be any need for recourse after the issuance of the extra-judicial decree.[23]

Thus, it seems that there would be no need to utilize the resources required for a judicial trial and as a consequence there would be a just cause standing in the way of the judicial process if the following are all true:

1. The accused has actually admitted to being the one who violated the law or precept or has, at least not contradicted such allegations when faced with them;
2. The accused has not offered any of those causes which are found in canons 1322-1323 which would cause incapacity to commit a delict or would make the person not subject to a penalty;
3. The criminal action has not been extinguished by prescription.

In such a situation, the goals of objectivity of judgment and of right of defense would be easily achieved and there would likely be no need to have an independent authority to which to have recourse.

However, we must equally keep in mind that if a perpetual penalty is deemed the proportionate penalty for the crime, then the Ordinary has no choice but to institute a penal trial according to the norm of canon 1342 §2.[24] It should be kept in mind that this same canon also provides that sometimes a law or precept can forbid the application of certain penalties by way

[22] Pio CIPROTTI, "Diritto penale canonico," *Enciclopedia giuridica*, v. 11, Roma, Istituto della Enciclopedia Treccani, 1989, p. 13.

[23] Claudio PAPALE, *Formulario commentato del processo penale canonico*, Città del Vaticano, Urbaniana University Press, 2012, pp. 28-29.

[24] Canon 1342, §2: Perpetual penalties cannot be imposed or declared by decree, nor can penalties be so applied when the law or precept establishing them prohibits their application by decree.

of the extra-judicial decree.[25] As will be discussed later, in cases of *graviora delicta* reserved to the Congregation for the Doctrine of the Faith in the *motu proprio*, *Sacramentorum sanctitatis tutela*, there are provisions for the application of perpetual penalties by way of the extra-judicial process.

As I look at the observations both of Pio Ciprotti and Claudio Papale, it would appear clear that much of what constitutes a just reason to use the extra-judicial pertains primarily to the state of knowledge about the legal violation and its imputability after the completion of the preliminary investigation. This is clearly not a suggestion that the preliminary investigation is anything more than it is supposed to be: a method of determining if there is *fumus boni iuris* of a crime, that is, that there is basis for the investigation in a penal process.[26]

In his article on the preliminary investigation, Damián Astigueta, S.J., professor of penal law at the Gregorian University, points out that during the preliminary investigation there is no provision for a *contradictorium*. Therefore, it would violate the right of defense of the person of interest in the investigation of a possible violation of a law or precept if the preliminary investigation would be focused upon gathering true evidence rather than simply the foundation for the initial report or *notitia versimilis de delicto*.[27] However, depending on the situation, very important information might come to light during the preliminary investigation. If it should happen during this investigation that the person of interest has made a confession of a legal violation or its equivalent, that the violation is imputable, and the matter is still actionable, as has been mentioned above, this might well form the basis for deciding there is just cause standing in the way of using the judicial process. For such a case, the various functions of the judicial process are not necessary for reaching objective moral certitude and preserving the right of defense.

As can be seen in the above discussion, the 1917 Code can be a great help in making this decision since it is much more detailed. At least one commentator on the 1983 penal law often refers to it.[28] Looking at the provisions of the 1917 Code regarding notorious facts and crimes we find that a crime is notorious if it has been confessed by the perpetrator[29] or if the

[25] *Ibid*., "….nor can penalties be so applied when the law or precept establishing them prohibits their application by decree."

[26] See canon 1505, §1, 4º.

[27] Damián ASTIGUETA, "L'investigazione previa: alcune problematiche," in *Periodica*, 98 (2009), pp. 209-220, esp. fn. 29.

[28] For example, see PAPALE, *Il processo penale canonico*, passim.

[29] 1917 *CIC*, canon 658 §1.

crime is publicly known and was committed under such circumstances that it can neither be hidden nor any excuse can be found for the behavior.[30] According to *CIC*/17 canon 1747, 1º, notorious facts do not need further proof. In such a setting there would be real reason for justifying the presence of a true and just obstacle to using the resources needed for a judicial trial.

5 — *Ius condendum?*

As William Richardson alerted us in a fine way two years ago, an initiative for *ius condendum* regarding Book VI is well underway.[31] I believe that the path for this proposal has been prepared by the particular and proper legislation which has arisen in response to what we know as the clergy sex abuse of minors crisis. In the USA, as you all know, the United States Conference of Catholic Bishops on 14 June 2002 established a text for particular law on this matter called the *Essential Norms* which eventually received the required *recognitio* by the Holy See. However, on 30 April 2001 Pope John Paul II had already issued a *motu proprio* entitled *Sacramentorum sanctitatis tutela* which did address the delict of sexual abuse of minors by clergy.[32] In this document we find the substantive and procedural norms regarding the reservation of certain major ecclesiastical crimes to the Congregation for the Doctrine of the Faith. Among the reserved delicts is the one against the sixth commandment of the Decalogue committed by a cleric with a minor below the age of eighteen years (art. 4). Although article 17 emphatically stated that the more grave delicts reserved to the Congregation for the Doctrine of the Faith must be pursued only in a judicial process, on 7 February 2003, Pope John Paul II nevertheless granted to the Congregation the following faculty:

> The faculty to dispense from article 17 in those grave and clear cases which, according to the Particular Congress of the CDF: a) may be referred directly to the Holy Father for an *ex officio* dismissal from the clerical state, or b) may be treated under the summary process of canon 1720 by the ordinary who, in case he is of the opinion that the accused should be dismissed from the clerical state, will ask the CDF to impose dismissal by decree.

[30] 1917 *CIC*, canon 2197, 3º.

[31] RICHARDSON, pp. 52-55.

[32] POPE JOHN PAUL II, apostolic letter *motu proprio* by which are promulgated norms on more grave delicts reserved to the Congregation for the Doctrine of the Faith *Sacramentorum sanctitatis tutela* (30 April 2001), in *AAS*, 93 (2001), pp. 737-739.

This same derogation from the use of the judicial process for the imposition of perpetual penalties was incorporated more simply in the 21 May 2010 edition of the *motu proprio, Sacramentorum sanctitatis tutela*.[33] Article 21, §2, 1º allows not only for a more grave delict to be adjudicated by an extra-judicial decree by the ordinary or eparch but adds that with a mandate from the Congregation he may himself impose a perpetual penalty.

Looking to the future and keeping in mind the particular law and proper law which have emerged in response to the sexual abuse crisis, it is not so surprising there would be a proposal to regularize this use of the extra-judicial process for the imposition of perpetual penalties in some instances. The interest in promoting the use of the extra-judicial process was strong even during the process of revision of the 1917 Code, as we saw. However, it seems to this author that legislation issued in order to respond to an emergency situation is not the proper font for any new penal legislation. On the other hand, there are those notorious situations in which objective moral certitude has been achieved, the right of defense may well be protected and in which the accused would not choose to have recourse to a hierarchical superior. In those situations, the application even of perpetual penalty by extra-judicial decree would appear to be justified. However, there should never be a presumption this approach would regularly be appropriate in light of the goal for objective certitude and for the defense of legitimate rights. In fact, recourse to the extra-judicial process to impose perpetual penalties should be the exception rather than the rule.

One wonders if what is needed more than a new Book VI is an instruction for the handling of all the penal processes to be found in the 1983 Code of Canon Law. The sex abuse crisis arose, as we know, in reality before the promulgation of the 1983 Code. Canonists were not comfortable with using criminal processes even though they were quite adept at handling matrimonial nullity processes and jurisprudence. On 15 August 1936, eighteen years after the 1917 Code went into effect, the Sacred Congregation for the Discipline of the Sacraments issued an instruction, *Provida mater,* for the handling of matrimonial nullity cases. On 25 January 2005 the Pontifical Council for Legislative Texts issued another such instruction, known as *Dignitas connubii*, a little over twenty-two years after the effective date of the 1983 Code of Canon Law. Thus, it could perhaps be said there is a "tradition" for developing an instruction for the handling of more complicated processes. An instruction for the penal process would seem an adequate instrument for

[33] CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Rescriptum ex audientia* and *Normae de gravioribus delictis* (21 May 2011), in *AAS*, 102 (2010), pp. 419 – 430.

addressing the challenge. If some modifications of the current law would be truly necessary, they could be clearly incorporated into the document and identified as such *in forma specifica*.

There remain serious concerns, however, regarding how the decision to use the extra-judicial process is made and especially in light of how it allows for a diminishment of the objectivity of that decision. As has already been pointed out, the person solely in charge of making that decision is the ordinary himself. Realistically, the diocesan or eparchial bishop really has three different roles to play in his ministry where this process is concerned:

Pastor + Party + Judge.

The bishop has the role of "oversight" over his entire diocese or eparchy. In exercising this role, he is pastor not only of the victims of ecclesiastical crimes but also of the alleged perpetrators. He is pastor of the relatives and friends of both and, indeed, of his entire diocese or eparchy. In this same role, he must take care of the patrimony of the diocese or eparchy. The Church has become aware of the horrendous nature of the sins and crimes which have been committed against the young and vulnerable by some clergy. Bishops can easily feel personally betrayed by their priests who have been accused of such violations. Also, many bishops are now pressured by their own civil attorneys to avoid risk, it seems, at all costs. This pressure is stemming, in the USA at least and in many other countries, by robust tort laws and related litigious activity by equally robust tort lawyers.

Canon 1718 §1, 3º, as we know, directs the ordinary to make the decision about which process to choose, following the mind of canon 1342 §§1 and 2. Although it is true that this decision could be made by a vicar general, for example, nonetheless this decision would hardly be divergent from the mind of the diocesan bishop.[34] As has already been said, the structure of this extra-judicial process is such that the ordinary really is a party in the case and not the judge "*super partes*" which happens in the judicial trial.

This structure is contrary to the strong cautions given us centuries ago by Magister Gratianus who said the judge, the accuser and the witness cannot be the same person.[35] Richard Fraher has pointed out that in the thirteenth

[34] *CCEO* canon 1469, §3 provides for greater objectivity in making this decision because it requires that before making any decision in the matter, the hierarch is to hear the accused and the promoter of justice regarding the delict. Yet, it leaves it to the hierarch to determine about consulting two judges or other experts of the law.

[35] GRATIAN, *Concordantia Discordantium Canonum*, Pars. II, Causa IV, Q. IV, C. 1 Accusator, testis uel iudex aliquis simul esse non potest. Nullus umquam presumat accusator simul esse et iudex uel testis, quoniam in omni iudicio quatuor personas semper esse necesse est,

century Henry of Segusio, usually called Hostiensis (c. 1200 – 6 or 7 November 1271), would argue from a dictum used by Innocent III, namely, that it is in the public interest that all crimes be punished, in order to promote the use of the *ex officio* investigation of crimes by the judge outside the usual *ordo iudiciarius*. Hostiensis believed that this process was legitimate and necessary despite that fact that this inquisitorial method reduced the protection for the right of defense of the accused.[36]

As at least one commentator[37] has pointed out, in the extra-judicial process there are grave dangers concerning the impartiality of the process because the ordinary can come into the process simply with his mind made up concerning the punishment of the accused. At this time in our western cultures, at least, appearances often seem to have more value than truth. In this connection, as I have already suggested, some bishops are laboring under grave fears that their diocese or eparchy would be adversely affected simply by the allegation itself and not by whether or not the allegation is true.

Because in the current law the ordinary exercises these two roles of oversight and the related role as a party, something needs to be done to eliminate this conflict in roles. My suggestion is that canon 1342, §1 be restored to its original form as found in the 1973 *Schema*. This would once again require <u>*grave*</u> reasons standing in the way of using the judicial process. Perhaps, even more importantly, there should be the restoration of that phrase which requires the presence of *probationes certae* before this extra-judicial process is allowed. Further, keeping in mind that the *CIC*[38] and the *CCEO*[39] require the bishop or eparch to have the consent of the finance council and college of consulters when it comes to the alienation of certain levels of patrimony, perhaps, it would be quite reasonable to require the ordinary to have the consent of three senior tribunal judges before using the extra-judicial process. In fact, with regard to the unfolding of the extra-judicial process itself, the wisdom of the East again could be sought by looking into what is required in the *CCEO* canons 1486-1487, for the validity and liceity of the extra-judicial process itself. The *CCEO* has a structure which involves a

id est iudices electos, et idoneos accusatores, defensores congruos atque legitimos testes. Iudices autem debent uti equitate, testes ueritate, accusatores intentione ad amplificandam causam, defensores extenuatione ad minuendam causam.

36 Richard M. FRAHER, "The Theoretical Justification for The New Criminal Law of The High Middle Ages: 'Rei Publicae Interest, Ne Crimina Remaneant Impunita'," in *The University of Illinois Law Review*, (1984), pp. 581-582.

37 PAPALE, *Il processo penale canonico*, p. 80.

38 *CIC* canon 1292 §1.

39 *CCEO* canon 1036 §1.

separate party to pursue the crime, namely, the promoter of justice. Further, canon 1486, §1, 2º requires the occurrence of certain oral sessions involving the input of the accused person in order for any extra-judicial decree to be valid.

Conclusion

I hope this study has helped to clarify the history of canon 1342 §1 and has offered some practical suggestions on how to implement it. As far as the future is concerned, I think the wisdom of Aristotle and the medieval scholastics might be well kept in mind: *in medio stat virtus*. In replying to a bishop in London in 1203 Innocent III counseled him that it was in the interest of the public not to leave a crime unpunished (the *dictum* referenced above).[40] Similarly, in this 21st century the Church cannot back away from employing penal procedures as long as they are truly a dispassionate search for the truth and protect the right of defense of the accused. If a new penal law sees the light of day in any form or even if there is an instruction according to the mind of the canons of the present Code, it is my hope that either course will be in the finest canonical tradition of our Church for whom the supreme law is the salvation of souls.[41]

[40] "publicae utilitatis intersit, ne crimina remaneant impunita," *Decretals of Gregory IX*, Lib. V, Tit. XXXIX, Cap. XXXV.

[41] *CIC* canon 1752.

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CHRISTIAN *OIKONOMÌA* REVISITED

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SUMMARY — The question of the marriage of divorced and remarried Christians is a thorny problem. What can the Church do in such situations? It cannot propose a solution that is different from or contrary to the words of Jesus. The indissolubility of sacramental marriage and the impossibility of a new marriage during the lifetime of the other partner is part of the tradition of the Church. The issue is therefore how the Church can reflect this indivisible pairing of the fidelity and mercy of God. The early Church Fathers with their prudent and compassionate principle of *oikonomìa* should be revisited today with an open mind and heart in order to rediscover ways that lead to truth, justice, and peace.

RÉSUMÉ — La question du mariage des chrétiens divorcés et remariés est un problème épineux. L'Église que peut-elle faire dans telles situations? Elle ne peut pas proposer une solution différente ou contraire aux mots de Jésus. L'indissolubilité du mariage sacramentel et l'impossibilité d'un nouveau mariage pendant la vie de l'autre époux fait partie de la tradition de l'Église. La question est donc comment l'Église peut refléter cet appareillement indivisible de la fidélité et de la miséricorde de Dieu. Les premiers pères de l'Église avec leur principe prudent et compatissant d'*oikonomìa* devraient être revisités avec un esprit et un cœur ouverts afin de redécouvrir des manières que conduisent à la vérité, à la justice, et à la paix.

Introduction

The importance of the Second Vatican Council (1962-1965) for ministry and ministers is closely connected to the council's major ecclesiological insights. The retrieval of the idea of the Church as a "people of God" and

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"communion" remains a fundamental intuition of Vatican II. "People of God" and "communion" will always be part of the Church's self-understanding. If we were to describe Vatican II in the language of motion, we would say that the Council Fathers initiated a movement in depth, taking a closer look at the sources of theology (*ressourcement*), and a movement outside the Church (*rapprochement*) in a wide assumption of responsibility for mankind.

Everyone knows that the question of the marriages of divorced and remarried Christians is a complex and thorny problem. The early Church, in our humble opinion, gives us an indication that can serve as a means of escape from today's dilemma.

1 — *Indissolubility of Marriage*

1.1 — The Eastern Fathers

On reading the works of the Eastern Church Fathers of the first five centuries, one comes across the most explicit and important texts concerning the topic at hand. There are not more than ten texts in all but sufficient for our purpose. By the sixth century there are already anthologies and "chains," or exegetical compositions that under each biblical passage list the various opinions of the Fathers, without giving any further explanations. In fact, canon nineteen of the Council in Trullo states, "If a scriptural passage should come up for discussion, the superiors of the Churches shall in no wise interpret it differently than the luminaries and doctors of the Church have set down in their writings."[1] The following are the opinions of the Church Fathers on the topic:

The Shepherd of Hermas (written around 140) lists "weakness in the flesh" (*asthenésteros tê sarkí*) among the most serious sins and reprimands those who consider them unforgivable (Parables 8 and 9).[2] In fact he states that such sins can indeed be forgiven, however, only once, after which the recidivist must be handed over to divine justice. The *Shepherd*, namely the Angel of Penance, tells Hermas: "If a man has a wife who believes in the Lord, and he finds her in some adulterous situation (*en moicheía*), as long as he was unaware of it, he does not sin. But if the husband knows about her

[1] George NEDUNGATT, *The Council in Trullo Revisited,* Roma, Pontificio Istituto Orientale, 1995, pp. 94-96.

[2] Michael HOLMES, *The Apostolic Fathers: Greek Texts and English Translations,* Grand Rapids, Baker Academic, 2007, pp. 596-678 and 508-511.

sin and the wife does not repent and persists in her immorality (*epiménê tê porneía*), and the husband continues to live with her, he becomes responsible for her sin and an accomplice in her adultery (*koinõnós tês moicheías autês*). What then should the husband do, if the wife persists in this passion? Let him divorce her (*apolusátõn autên*) and let the husband live by himself. But if after divorcing his wife he should marry another woman, then he too commits adultery. If the (first divorced) wife repents and wants to return to her own husband, she will be taken back. If the husband does not take her back, he sins and brings a great sin upon himself. In fact, the one who has sinned and repented must be taken back. But not repeatedly: for there is only one repentance for God's servants. So, because of the possibility of her repentance, the husband ought not to marry. This procedure applies to wife and husband." (*Commandment* 4.1)

St. Justin Martyr (+ 165), in his *First Apology* states explicitly: "Bigamists are sinners in the eyes of the Master."[3]

Athenagoras (2nd cent.), in his *Supplication* to the emperors written around the year 180, calls the second marriage an "honorable adultery" and the widower who marries again a "copycat adulterer."[4]

Clement of Alexandria (+ 213 about) denies any possibility of divorce.[5] Origen (+ 254), while confirming the indissolubility, makes this observation: "Since God has joined, grace is given to those he joined."[6]

St. Methodius of Olympus (+ 311) sees the mystical reason for indissolubility in the parallelism proposed by St. Paul in Ephesians between Christ's union with his Church.[7]

St. Basil the Great (+ 379) acknowledges indissolubility when he proclaims that it is part of sacred tradition.[8]

St. John Chrysostom (+ 407) writes in his *Note of Repudiation* that only death can dissolve the marriage bond.[9]

[3] Daniel RUIZ, *Padres Apologetas Griegos: Texto Griego-Version Española,* Madrid, Biblioteca Autores Cristianos, 1979, p. 196.

[4] *Ibid*. pp. 703-704.

[5] Theodore MACKIN, *Divorce and Remarriage,* New York, Paulist Press, 1984, pp. 126-130; *Stromata* II, 23.

[6] *Ibid*., pp. 130-133; Allan MENZIES, "Origen's Commentary on Matthew," in *Ante-Nicene Fathers,* vol. 9, Peabody, Hendrickson Publishers, 1994, pp. 505-506.

[7] Herbert MUSURILLO, *St. Methodius: The Symposium,* Westminster, Newman Press, 1958, pp. 41-48.

[8] Benoit PRUCHE, *Traité du Saint-Esprit,* Paris, Editions du Cerf, 1947, p. 40.

[9] *De libello ripudii,* in PG 51, col. 221; MACKIN, pp. 152-155.

St. Cyril of Alexandria (+ 444) recognizes the appropriateness of indissolubility while commenting on the marriage at Cana.[10]

1.2 — The Eastern Discipline

In order to have an immediate and significant idea of the Eastern discipline in this matter, it is sufficient to consult the liturgy which always represents the clearest and most indicative discipline in any subject. The Byzantine marriage ceremony contains two ritual actions (*akoluthìa*): a) the engagement, and b) the crowning (or the nuptials). These ceremonies are assigned to two separate moments: the engagement should precede the nuptials by weeks or even months. Nowadays the trend is to unify the two ritual actions; however, the liturgy keeps symbolically separate the two moments.[11]

The engagement: Everything takes place at the narthex. The priest meets the two candidates and asks them to make manifest their free consent; he imparts three times the sign of the cross on each one's forehead; then he proceeds to give them the rings, an iron one for the man and a golden one for the woman. The rings had been placed beforehand on the trapeze, the iron one on the appropriate side of the iconostasis corresponding to the "doorway of the Son;" the golden one on the side corresponding to the "doorway of the Mother."

Concerning the diversity of metal for the two rings this is what the greatest symbolist of the Eastern liturgy, Metropolitan Simeon of Thessalonica (+ 1429), has to say: "The iron ring stands for the strength of the man, while the golden one indicates the special nature of the woman, namely her preciousness and fragility, hence in need of more protection and care, just as gold is in comparison with iron."[12]

The priest takes the gold ring in his hand; he crosses three times with it the forehead of the groom and places it on his hand. He does the same with the iron ring and places it on the bride's hand. At this point the best man makes sure that the two rings are exchanged. We should note that the spouses had previously received the rings from the priest in the form of a "chiasm" [cross] that indicates the coming together, namely the sacred bond

[10] PG 73, col. 223; Philip PUSEY, *St. Cyril of Alexandria Commentary on John,* Oxford, Early Church Fathers, 1887, p. 155; George JOYCE, *Christian Marriage: An Historical and Doctrinal Study,* London, Sheed and Ward, 1933, p. 159.

[11] Leonidas CONTOS, *Sacraments and Services*, Book One, Northridge, Narthex Press, 1993, pp. 42-71; Alphonse RAES, *Le Mariage dans les Eglises d'Orient,* Paris, Editions de Chevetogne, 1958, pp. 47-68.

[12] *De honesto et legitimo conjugio,* in PG 155, col. 509.

of mutual love. Thus the engagement rite is completed and the two engaged man and woman return home where a convenient feast is prepared. If instead the *akoluthia* (ceremony/service) of the wedding follows immediately, then the priest gives the two spouses two lighted candles and leads them into the church up to the *tetrapódion* (square small table) that stands in front of the "royal door," which is the central door of the *ikonòstasis* (icons screen).

The crowning: The spouses come forward, at a marching pace, toward the coveted "crowns" that signify the complete victory of love. *Stephànon* is the liturgical name given to the marriage, "the sacrament of the crowns." The priest opens the procession with a burning censer in his hand; the spouses follow, being surrounded in the same burning mist of incense, all looking forward to the *vima* (sanctuary) to receive the final seal to their love dream. Reaching the beautiful door, the priest joins their hands that remain united as he recites the appropriate prayer. At this moment the priests places a wrought iron crown on the husband's head, while pronouncing the formula: "God's servant N.N. is crowned for God's maid N.N." The same is done for the wife. He blesses them three more times. Then he reads the epistle and the gospel. The first scripture reading is taken from the Letter of Saint Paul to the Ephesians, chapter five: Christian marriage must be modeled after the union between Christ and his Church. The gospel reading is taken from Saint John, chapter two: the marriage feast at Cana. As a commentary of the gospel pericope, the priest blesses a cup of sweet wine (the sweetness of conjugal life) while reciting two beautiful prayers invoking lasting love, peace and unity. He then gives the cup to the husband who takes three sips, passing it to the wife after each sip. In the meantime, the choir sings psalm one hundred fifteen about the Lord's chalice and the fulfillment of all the vows. After this, in some Churches the priest returns the chalice to the husband who breaks it casting it to the ground. It is a gesture full of meaning: the marriage bond is maintained through the most faithful loyalty (namely both drinking from the same cup): if the loyalty cup is broken, marriage is also broken. There follows a moment of silence, after which the priest invites the spouses to hold each other's hand and go three times around the tetrapod: it signifies life's journey by both of them, under the same yoke and bound by the same destiny (con-sorts, partners). He concludes the ceremony with the *apòlisis* or final dismissal.

The priest also takes part at the wedding banquet. This is prescribed by some ritual. The priest sits at the place of honor, the husband at his right and the wife at his left. The spouses wear on their heads the nuptial crowns, which normally are made with olive and laurel branches, strewn with flowers. They will lay them down in the church on the eighth day when they

will receive a final blessing. These crowns, taken home and set over the nuptial bed, will be replaced by artificial ones on which the best man will write the wedding date and the names. They will remain at the head of the bed even after the death of one of the spouses. In his Homily Nine on the First Letter to Timothy, Saint John Chrysostom writes: "Crowns are wont to be worn on the heads of the bridegrooms, as a symbol of victory, betokening that they approach the marriage bed unconquered by pleasure. But is captivated by pleasure he who has given himself to harlots, why does he wear the crown, since he has been subdued?"[13]

There is also an *akoluthia* for the marriage of a widow or widower: being this the second nuptials, everything takes place at the narthex (vestibule area) and without crowns. That was the case in earlier times. Nowadays, however, it is tolerated that the second marriage be celebrated inside the church at the tetrapod and with crowns. On the other hand, the priest reads to the spouses the ancient disciplinary canons and announces, with a reflective/subduing tone, that he will not take part at the wedding banquet. All this clearly shows how the Eastern Church emphasizes the first marriage, because only the first marriage reflects the unique and eternal marriage of Christ and his Church. Indeed, Saint Paul himself bars the access to the office of diaconate and priesthood all men who have entered a second marriage. In fact, the Eastern Church points out: the second marriage by itself constitutes something inappropriate for the hierarchy, and will be allowed only to the simple faithful; moreover, a third marriage will never be allowed, but only tolerated in some extreme cases in very exceptional circumstances. Therefore second marriage and even more a third marriage are considered an exception to confirm the rule. The rule is: conjugal fidelity must be kept to the utmost and ideally continue even after death. This explains certain harsh expressions of the Church Fathers who censure a second marriage with debasing words calling it "concealed adultery!"

2 — *Divorce*

This being said on the indissolubility of marriage, why does the Eastern Church *de facto* accept divorce? This is true, but only up to a point. It is not true in the generalized and trite understanding, because the possibility of divorce on demand is excluded by the fact that only a second marriage is

[13] Philip SCHAFF, "Homily IX on I Timothy," in *Nicene and Post-Nicene Fathers,* vol. 13, Peabody, Hendrickson Publishers, 1994, p. 437.

allowed. Moreover, it is not true even in the sense of allowing a full and immediate dissolution of marriage to the couple seeking a divorce, as we shall see. Nevertheless, it is an obvious fact that in all the Eastern Churches —both Orthodox and pre-Chalcedonian—divorce is clearly a canonical institution. How can this be explained? We must, first of all, go back once again to the mind of the Church Fathers.

According to the *Shepherd of Hermas*, when a spouse, after being forgiven a second time, falls again in one of the most serious sins (homicide, adultery or apostasy), the innocent party is not bound to wait for the guilty party to return because he/she has been abandoned by the Church to divine justice. Indeed, since the guilty party has been cut off from the ecclesial community, he/she must also be cut off even by the domestic community. The faithful spouse must separate completely from the excommunicated party. Such drastic and definitive expulsion carries with it the breaking of the conjugal bond. Such conclusion is in conformity with the spirit and the context of the entire *Shepherd of Hermas.*

Origen (+ 254) speaks of a canonical divorce granted by some leaders of the Church which he excuses in the following terms: "In order to avoid greater evils, against the first law as quoted by the Scripture." In other words, Origen sees in this concession a renewal of the Old Testament divorce permitted by Moses on account of man's hardness of heart, as Jesus said, "although in the beginning it was not so."[14]

St. Basil (+ 379) in his First Canonical Letter to Bishop Amphilochius of Iconium writes: "She who left is an adulteress if she went to another man. But he who was abandoned is to be pardoned, and she who dwells with such a one is not condemned."[15]

St. Epiphanius (+ 403) is not afraid to write: "The husband of only one wife is more highly respected and honored by all members of the Church. But if the man could not be content with the one wife, who had died, or if there has been a divorce for some reason—fornication, adultery or something else—and the man marries a second wife or the woman a second husband, God's word does not censure them or bar them from the Church and life, but tolerates them because of their weakness. The holy word and God's holy Church show mercy to such a person, particularly if he is devout otherwise and lives by God's law—not by letting him have two wives at once

[14] *Op. cit.;* Hom. 14 in Mt.23.

[15] Agnes WAY, *Saint Basil Letters,* New York, Fathers of the Church, 1955, p. 20; Yves COURTONNE, *Lettres,* Paris, Belle Lettres, 1966. C. DATEMA (9 ed.), *Asterius of Amasea. Homilies*, Leiden, Brill Academic Publishers, 1970.

while the one is still alive, but by letting him marry a second wife lawfully if opportunity arises, after being parted from the first."[16] Which "holy word" shows tolerance as an act of mercy in this matter? It is the word of Saint Paul in his Second Letter to the Corinthians where he speaks of the incestuous man whom he had harshly reprimanded in his First Letter and for whom he now asks for compassion. In fact Epiphanius quotes these very words later in his passage. But when and how "does the holy Church of God shows compassion for him," namely for the person who would objectively be guilty of breaking the marriage bond? We will see later in the course of this essay.

Saint John Chrysostom (+ 407) writes: "When the husband dismisses the adulterous wife, marriage is already dissolved."[17]

Asterius, bishop of Amasia in Cappadocia (+ 410) says: "Let it be known that marriage is broken only by death and adultery."[18]

Theodoret of Cyrrhus (+ 458), in his *Summary of Heretical Tales*, mentions twice that only fornication is sufficient cause for breaking the marriage; to do it for other reasons would be to commit adultery.[19] He repeats the same statement in his *Cure of Greek Maladies*: "Fornication truly breaks the marriage bond."[20]

St. Hilary of Poitiers (+ 368), who lived and wrote for a long time in the East, in his *Commentary on Matthew* states: "It is said that whoever separates from his wife, let him give to her a certificate of separation, etc. Establishing equity for all people, the Lord instructs the spouse to remain above all in marital harmony. By adding many things to the Law, no part of it is diminished. Nor can one reasonably find fault with the progress made [by the gospel]. Whereas the Law had granted the freedom to give a certificate of separation on the authority of the document, now the evangelical faith not only proclaimed its desire for concord to the husband, but also imposed guilt for forcing his wife into adultery. If out of the necessity of separation she marries another with no other reason than for ending the first marriage, it is said that she dishonored her [new] husband because of this union with a prostitute wife."[21]

[16] Frank WILLIAM, *The Panarium of Epiphanius of Salamis,* Books 2-3, New York, Leiden, 1994, pp. 105-106.

[17] *Hom. 19 in I Cor.*

[18] *Hom.in Mt. 19,3.*

[19] *Sum. V, 16, 25.*

[20] Pierre CANIVEL, *Thérapeutique des Maladies Helléniques,* Tome II, Paris, Editions du Cerf, 2001, p. 9.

[21] Daniel WILLIAMS, *St. Hilary of Poitiers Commentary on Matthew,* Washington, CUA Press, 2012, pp. 69-70; Manlio SIMONETTI, "Note sul Commento a Matteo di Ilario di Poitiers,"

Commenting on the First Letter to the Corinthians, Ambrosiaster states: "The husband should not divorce his wife, though one should add the clause *except for fornication*. The reason why Paul does not add, as he does in the case of the woman, *But if she departs, he should remain as he is*, is because a man is allowed to remarry if he has divorced a sinful wife. The husband is not restricted by the law as a woman is, *for the head of the woman is her husband*."[22]

Canon Forty-Eight of the *Apostolic Constitutions* (whose final compilation belongs to the V-VI centuries) points out that the spouse, whose infidelity was the cause for divorce, cannot remarry.[23] This suggests that the innocent party may do so; otherwise one could not justify the specific mention. It is, in fact, known that no injunction is superfluous in the juridical style. Therefore the innocent party is free to remarry.

We must agree that the principle of indissolubility is far from indisputable among the Church Fathers. The Eastern Fathers view this point as a so-called *theologùmenon - quaestio disputata* [theological debatable question], hence not binding in the theological field, let alone in the practical one. However, let us refrain from asserting that the Church Fathers are in contradiction with one another; far from it! From the comparison and summary of their statements their thinking is quite clear: the first marriage can become "second marriage" only by way of a twofold exception: through widowhood of one party or through his innocence. This is all! The freedom of the innocent spouse is eloquently explained by the action of the broken chalice (which takes place at the conclusion of the marriage liturgy, as we have seen).

The thinking of the Church Fathers finds its most graphic illustration in this ceremony.[24] Someone might object that, even when both spouses are

in *Vetera Christianorum*, 1 (1964), pp. 35-64.

22 Gerald BRAY, *Ambrosiaster Commentary on Romans and Corinthians,* Downers Grove, InterVarsity Press, 2012, p. 105.

23 Domenico SPADA, *Costituzioni dei santi apostolic per mano di Clemente,* Roma, Urbaniana Press, 2001, p. 254; Perikles JOANNOU, *Discipline générale antique,* Grottaferrata, Tipografia Italo-Orientale 1962.

24 Scholars of comparative history of religions are of the opinion that the breaking of the chalice/glass is just a surviving ritual from history, devoid of any religious meaning and indeed connected with some superstitious practices. Others think this action recreates the sudden coming into the scene of the ancient mime which, within the spirit of the matrimonial celebration, breaks the cup of the spouses and exclaims, "Luck is like a glass" (*Fortuna vitrea est!)* in order to disenchant the spouses and bring them face to face with life's reality. According to some Byzantine Catholic authors, it would be like an exorcism to prevent that other lips might touch the matrimonial cup which is only reserved to the two spouses; hence a wish of perpetual and mutual fidelity. Byzantine Orthodoxy instead goes even further since it signifies that the broken cup is a warning to the new couple that the broken marriage on account of the guilty party is totally to his/her detriment alone.

unfaithful/adulterous, marriage is destroyed; indeed, given these premises, it is automatically ruined. However, it is not so. In such a case the two spouses are bound to one another, no matter what, as it were, like two sheeps tied to one cord.

Only the innocent party can remarry; however, on the guilty party, or on both, when they are simultaneously guilty, there weighs what we may call the penalty of retaliation. In fact, in addition to the juridical law of dissolution, which applies to the innocent party, there is also the law of interdict which chains the guilty one to the same bond that he would like to break by way of his unworthy conduct. For him in fact are rightly reserved severe sanctions of condemnation and the perpetual prohibition to marry again until the innocent party is alive (this at least in principle).

Now we must ask ourselves: on the basis of what principle did the Church Fathers admit the exception for the innocent party? Certainly not on the theological debate mentioned above. Indeed this principle of the Church Fathers could not emerge clearly except at the time when the patristic age was over; we know in fact from Origen that during his times there were bishops who were granting the divorce.

On account of what principle? Our answer is that it is on account of the *power of compassion* that pertains to the Church, and of which we find mention in Saint Epiphanius and even earlier in Origen. This power has its own theological history and has its own technical name: *oikonomìa*.

3 — *Theology of* Oikonomìa

This *oikonomìa* cannot be adequately understood by the Western Christian mentality except by having recourse to a very lofty and deep reasoning. We must go back indeed to the Holy Trinity if we are to follow to its end the Eastern thinking in this doctrinal and practical area that has far reaching consequences and vast implications.

The term *oikonomìa* is found expressed at length, for the first time, in Saint Irenaeus of Lyons (+ 202), in whom it designates precisely the dynamic idea of the sharing and participation of the intimate life of the Trinity: it goes under the meaningful Greek term *perikòresis* and it means a circular exchange[25]. Even the powerful mind of Tertullian (+ 240), speaking of the Trinity, uses this

[25] Alexander ROBERTS, "Irenaeus, Against Heresies," Book. 3 Chap. 6: 2, in *Ante-Nicene Fathers,* vol. 1, Peabody, Hendrickson Publishers, 1994, p. 419.

terminology, despite his juridical perspective: "The mystery of *oikonomìa* which organizes unity into the Trinity."[26] This *circumcessio* (Latin term meaning 'all-around-exchange'), in its outward manifestation is essentially revealed as *theo-philantropìa* (incarnation, redemption, the sacraments, grace, charismas, et cetera). Since the Church reproduces in herself the Trinitarian reality and is in herself the great symbol (from which derives the *koinonìa*-communion of the sublime texts of Saint Paul and of the *Didaché*, for the same reason the "divine compassion" is activated in the Church. How is this done? It is done by way of the exceptional and munificent exercise of the "power of the keys," and in particular of the "keys that open." We find here the essence of the pastoral ecclesiology in the Eastern theology. Saint John Damascene (+ 754), who in his writings sums up the entire thinking of the Greek Fathers and brings it to a close in a sublime manner, commenting on Jesus' transfiguration, takes inspiration from the presence of Moses in order to compare God's manifestation on Mount Tabor to God's manifestation on Mount Sinai; in fact he calls Moses the "exarch of the Old Testament and Peter the head of the new order."[27] Peter's "power of the keys" also belongs to the Twelve (Mt 18: 18), and the bishops are the successors of the twelve apostles; so they too are "bearers of the keys of God's kingdom."

The keys not only bind, but also open, namely they loosen and release. While it is written that "man should not divide," it is also written that what men cannot divide on earth, the bearers of heaven's keys surely can. Saint Paul offered an example when, in chapter seven of his First Letter to the Corinthians, he speaks with authority in this sense saying: "This I say to you, not the Lord."

Therefore we should not wonder when a contemporary Greek Orthodox theologian writes with assuredness (and we sum up his thought): "*Oikonomìa* is the method that the Church applies for the good of the souls. The Church as dispenser of grace can do many things: she revives radically the sacraments that are objectively invalid, as well as, on the contrary—in order to resolve difficult situations that would damage the souls in the long run—she declares the termination of positions and situations which had been valid under all other aspects. Such is the power of the gospel keys to be applied to the entire sacramental system, not simply to the sacrament of penance."[28]

[26] Alexander ROBERTS, "*Tertullian,*" in *Ante-Nicene Fathers,* vol. 3, Peabody, Hendrickson Publishers, 1994, p. 598.

[27] *Minea VI,* Roma, Poliglotta Vaticana, 1901, pp. 329-345; "Holy Transfiguration of the Lord," in *Menaion XI,* Liberty: St John of Kronstadt Press, 1997, pp. 69-81.

[28] Konstantinos DYOVOUNIOTIS, *The Sacraments of the Eastern Church from the Orthodox Viewpoint,* Athens, University Press, 1912, pp. 161-164; Yannis SPITERIS, *La teologia ortodossa neo-greca,* Bologna, Edizioni Dehoniane, 1992, pp. 169-184.

All of this—with due regards to other different aspects—is expressed in the western canon law by the Latin words *supplet Ecclesia* [the Church will provide] and in moral theology by the application of *epikèia* [adaptation]. However, the debate on *oikonomìa* in eastern theology reveals perhaps greater elasticity and efficacy with the help of a greater optimism in the power of grace and of the resources of divine mercy as the supreme law for the good of souls.[29] Therefore we can assert that *oikonomìa* touches the totality of the plan of salvation in its dynamic practical application. From this perspective, which opens up to very vast horizons, the canonical institution of the dissolution of marriage finds its place and justification.

4 — *Discipline of* Oikonomìa

4.1 — Exegetical Viewpoint

The exception of Matthew chapter five, verse thirty-two is still the fundamental basis for separation. Two more motives are added, namely death and the sins that exclude from God's kingdom. Upon this threefold foundation is based a threefold list of similarly valid reasons that together correspond to about twenty motives for divorce. Let us examine them.

– *On account of adultery* (in all its entire affective and effective variations and specifics): 1) Adultery made to look like a marriage (not just on account of a single act); 2) If the man tempts the virtue of his wife by inducing her to commit sin with another man; 3) If the wife, against the will and knowledge of the husband, lives with another man; 4) If the wife frequents public baths or games or similar places; 5) If the wife spends the night outside her home without serious cause; 6) If the husband accuses falsely his wife of adultery; 7) If the wife induces an abortion out of hate for the husband.

– *On account of death* (by a logical development of Saint Paul's text of First Corinthians chapter seven, verse thirty-nine "if the husband died, the wife is free, and she can marry whomever she wants", and we have the list of several kinds of "death:" civil, moral, psychological, spiritual (as apostasy) or mystical (as embracing monastic life); hence: 1) the imprisonment of the partner on account of perpetual and

[29] Martin JUGIE, *Theologia Dogmatica Christianorum Orientalium,* Paris, Letouzey & Ané, 1930, III, pp. 459-467; Geoffrey BROMILEY, "Gamos," "Moicheia," "Porneia," in *Theological Dictionary of the New Testament—Abridged in One Volume,* Grand Rapids, Eerdmans Publishing Company, 1985, pp. 111, 605, 918.

shameful punishment; 2) total paralysis or weakness of the limbs impeding conjugal life; 3) irreparable dementia; 4) abandoning the true faith; 5) the entering of one partner into monastic life.

– *On account of iniquity* (from Saint Paul's text of First Corinthians chapter six, verses five to ten "people who do wrong will not inherit God's kingdom." And there follows the list of iniquities: 1) sodomy; 2) bestiality; 3) domestic violence; 4) drunkenness; 5) squandering the goods of the partner; 6) abominable slander even directed against the relatives of the partner; 7) malicious abandoning of one partner by the other; 8) scandalous thievery.

As one can see, the canonical exegesis has elaborated the list of Saint Paul, by adding other iniquities/failures, all interconnected either by affinity, by antithesis or by greater gravity of evil. For instance, bestiality is added to sodomy, and the squandering of goods to avarice, etc. Idolatry is already included in the list of spiritual death together with apostasy. Let us keep in mind that according to the *Shepherd of Hermas* the 'three most serious crimes' exclude from the ecclesial as well as the domestic community (the Christian family must be like a miniature Church); indeed, both communities are images of the kingdom of heaven.

For the sake of completeness, we need to add another comment: if this manner of reasoning seems somewhat "Byzantine," in the pejorative sense of the term, to the western mentality, we should recall that in the West as well, by way of the biblical concordance of a single word, *fornication*, both Saint Jerome (+ 420) but especially Saint Augustine (+ 430) have compiled a long list of almost all crimes imaginable, quite different one from the other; such list is accepted by Saint Thomas Aquinas (+1274) in his *Golden Chain* (Mt 5: 32).[30]

4.2 — Legislative Viewpoint

The canonical debate: It began with the Justinian Code of the sixth century and reached its greatest development between the ninth and eleventh century by way of reflections and commentaries of theologians and moralists and through decisions issued by patriarchal decrees. This huge legislative work was already completed by the year 1,000. Only four decrees were issued by the Patriarchs of Constantinople after the year 1,100. The first is the decree of Manuel II (+ 1255) which concerns the

[30] John PARKER, *St. Thomas Aquinas, Catena Aurea,* London, Christian Classics Library, 2010.

absence of the partner for five years without any news from the absent spouse [presumption of death]. The second and third are two decrees by John XIII Glykys of 1315: the first concerns the husband's extreme dislike of the wife on account of physical imperfections willfully concealed by the wife before marriage; the second deals with the mutual relentless hostility out of suspected infidelity which makes cohabitation intolerable and dangerous. The fourth is the decree of Patriarch Isaias of 1325 dealing with the resentment of the wife toward the husband on account of inflicted injuries and humiliations.

With the exception of these late patriarchal decrees (drawn from or at least inspired by the Justinian Code), the entire canonical system on divorce, as we said, was already abundant, diversified and practically complete around the year 1,000.

The civil debate: It stems from an essentially lay-religious principle which was already introduced by the ecclesiastical policy of the "sacred emperors" of Byzantium, successors of Constantine and Justinian, who promoted and organized seven ecumenical councils. The emperors were called "quasi-apostles" in the acclamations of the synods, depicted in the mosaics with a halo and mentioned also in the liturgy. Even Dante Alighieri (+1321) was fascinated by this fact as he speaks of it in the sixth canto of his *Paradiso*. It is no surprise therefore that in the East the Justinian law is considered "sacred law;" in fact the decrees issued by the Byzantine imperial offices throughout the centuries were considered by the Orthodox tradition as "sacred sources" and a continuation of the apostolic canons. From this fact there originates the principle, always held valid by the practice of the Christian East, that the civil and state authority, along with that of the Church, was also considered a veritable "sacred power of enacting ecclesiastical laws." It's no wonder therefore that the Byzantine imperial legislation held everything that in any way concerned the person of the emperor and the safety of the state as pertaining to its authority, even in the ecclesiastical field. Hence, it widened the "reasons for divorce" applying them even in the political area.

Hence a divorce was granted when the following cases were verified: 1) failure to reveal a plot against the emperor by the other partner; and 2) if the husband, living with the enemy, did not manifest his intention to return.

The Russian Code expanded the principle even further, by claiming for the Czar the right to accept any request for divorce, even if based on extra-canonical motives or at any rate absolutely eccentric. However, this was so only from the year 1700, namely from the time when Peter the Great abolished the Moscow patriarchate.

When the emperors ceased to exist, even this imperial casuistry disappeared in Constantinople, ever since 1453 when Byzantium fell under Muslim control and in Moscow in 1917 with the Russian revolution. At that point, the Pravo-Slavic Church reconstituted the Moscow patriarchate (at least for a few years before the general persecution initiated by Stalin), and proclaimed its freedom in the ecclesiastical field, including the authority in matrimonial legislation. This took place with the decrees of the Pan-Russian Great Synod held in Moscow from August 1917 to April 1918. This canonical independence from the civil authority (all the more so since such power proclaimed its atheistic tenets) was confirmed by the Synod of Moscow held on the occasion of the fifth centennial of the autocephalous Russian Church, 18 July 1948. Finally all of this was reasserted by the Pan-Orthodox Conference of Rhodes in 1961. As a consequence of all these repeated stands on the official level, the civil legislation with its historical justification, although accepted by the Orthodox ecclesiology, seems definitely gone from the doctrinal point of view.

4.3 — Application Viewpoint

The various motivations for divorce, by their very nature, call for several procedures. In this essay we present only the general outlines, which apply to the majority of cases.

The person seeking to divorce approaches his bishop who evaluates the situation. He then submits the case to his own spiritual tribunal. From the date when the case is introduced, at least a year must elapse during which time the validity of the motives must be verified and the innocence and guilt of the two parties must be ascertained from the juridical point of view. After that, the entire file goes back to the bishop who takes the conclusions of the tribunal into account and acts accordingly.

Examining this topic more in details, the juridical verification of adultery in its various kinds is filled with various conditions which are rather important and all-inclusive. For instance, it is not sufficient that the guilty party was caught red-handed, as it were, or instead that he is guilty of a single adventure which must be documented, in any case; it is necessary to prove a continuity of the acts of infidelity which truly affects the continuity of communion that is at the basis of married life, in keeping with the philosophical and psychological axiom that "one act is a passing event, while the habit is a permanent one." How long a period of time is needed to establish such habit? According to the general doctrine, which is reflected in the application of the law, it is said that a full course of four seasons is required,

namely one year, which manifests the opinion that certain moral deviations and desertions—as often happens—are passing episodes connected to whims, or the effect of seasonal changes or occasional circumstances. All these elements seem to be insufficient by themselves to destroy irreparably the moral continuity of conjugal life. In fact, they often leave intact the physical continuity of family life. For this reason, before the judicial action begins its course, the innocent party should work for reconciliation by exhorting or better still by imploring with loving reminders the partner who perhaps might be the victim of an infatuation. Only when the guilty partner seems to be insensitive and obstinate in his position, only then the innocent party has the right to approach the bishop to obtain a judgment of dissolution of the marriage bond. This judgment always contains a punitive clause that appears quite severe to the guilty party: he/she will never be able to marry the partner in sin, not even after the death of the innocent party.

4.4 — Unfaithful Party

The discipline of *oikonomìa* takes care also of the guilty/unfaithful party, who, generally speaking, should be prohibited from entering a new marriage as long as the innocent party is alive. Death, however, is a universal equalizer. In the life of an individual certain situations can last a single brief season or be protracted for half a century or longer. In this case, is there an alternative of years applicable to the sanction of prohibition?

The answer is yes. The various autocephalous Churches have resorted to periods of prohibition of varying duration: seven years for the Greek Church, fifteen for the Slavic Church, and twenty for Armenian Church. As a result, after the years of interdiction are over, even the guilty party is allowed to remarry (let us keep in mind in this connection the broad area of tolerance devised by Saint Epiphanius): he is permitted to remarry with anyone, but never with the partner in sin.

Conclusion

At this point, we may offer some conclusive remarks. All things considered, the application of divorce according to the Orthodox doctrine and practice appears like a panorama of vast possibilities, filled with psychological sensitivity and significant procedural gimmicks. It is a system of balanced realism, devised to take care of the complicated and mysterious realities of the human heart and its mishaps: the Italian writer Alessandro

Manzoni (+ 1873) would comment: "such is the messy situation of the human heart!"

What we have expounded so far reveals quite clearly the antithetical presentation of the matrimonial question and the manner to deal with it by the Latin and the Greek Churches. The Latin Church manifests a characteristically juridical mentality; the Greek Church exhibits an obviously more mystical and Pauline outlook. The Latin Church fixes, in a way, the biblical data in the absolute indissolubility. However, some judgments issued by the Roman tribunals may seem a "juridical by-product" which shows a great deal of forensic juggling dexterity when it looks for motives of marriage annulment in cases that are actually impossible.

Moreover, it is equally disconcerting to see that widows/widowers are allowed to remarry repeatedly without limitation. Precisely in the acts and decrees of the Council of Florence (1438-45), in the Bull of Union with the Armenians we read: "We declare that not only a second marriage can be allowed, but a third, a fourth and even other marriages as well, if there exist no other impediment."[31]

We must not forget, moreover, that in the West, at the time of Aquinas, theologians still debated whether marriage between baptized people was a sacrament or not! And until the Council of Trent (1545-1563) it was debated whether the sacrament of marriage conferred grace "*ex opere operato*" [by its very nature] as the other sacraments do or whether it was simply a "minor sacrament" to be confined to the appendix of the sacramental system. It was said at the time that it conferred only a "purging grace," namely in the sense that it neutralized the original sin that somehow re-emerges in the very act of conjugal love. Therefore, the sacramental rite of matrimony was considered worthy only of a minor liturgy, almost to be celebrated secretly. For this reason the liturgical ceremony of matrimony in the Roman rite until recently appeared, as it were, in a stunted and almost subdued presentation. When all is said and done, one has to admit that the Eastern Church manifests a higher respect for and a more appropriate treatment of the sacrament of matrimony!

Indeed, the liturgical beauty of the "ceremony of the crowning" which was firmly established around the end of the first millennium in the ritual books (hence at the time of the greatest development of the Eastern legislation on divorce) is an eloquent indication of the high regard and deep

[31] Norman TANNER, *Decrees of the Ecumenical Councils,* vol. I, Washington, Georgetown University Press, 1990, p. 581.

respect that the entire Christian East has always exhibited toward the sacrament.[32]

After a deeper examination, the canonical system on divorce, all in all, exhibits a striking religious and psychological insight in helping a couple, namely "two living beings under the same yoke," to become two consorts in the most beautiful and intimate meaning of the word: two hearts fully blended in the spirit and in the flesh in order to live together the destiny of a renewed marriage in the most peaceful and joyous manner!

All the Eastern Churches, both Orthodox and pre-Chalcedonian—including those that were always opposed to Byzantine imperialism, such as the Coptic and Ethiopian, the Syriac and Armenian Churches—were always in agreement in admitting canonical divorce. And this was not the result of a moral laxity and prevailing secular power, as it was often claimed by some during the Second Vatican Council (1962-1965).

The Eastern Church has always resisted valiantly on other matters of morality and canonical discipline. For instance, while some civil legislation allowed divorce by mutual consent, the Eastern Church has never accepted that; indeed it resisted for centuries, up to the point that it was the civil legislation that gave in by accepting the ecclesiastical point of view in the ninth century.

The Patriarchal Vicar for the Greek-Melkite Catholics of Egypt, Archbishop Elias Zoghby, addressed twice the assembly of Vatican II (29 September and 4 October 1965) on this subject.[33] We sum up his views and would like to put them down as a seal to our modest study:

– The Fathers and Doctors of the Eastern Church, who placed the foundations of Christian doctrine and are the overwhelming majority of the Fathers of the great ecumenical councils, cannot be accused, without temerity, to have given in to worldly considerations or to political pressure when they interpreted the words of Christ of chapters five and nineteen of Matthew. To presume to say so means to forget how much the universal Church owes to their knowledge and holiness.
– The Justinian Code, promulgated around the end of the sixth century, which embraced the present Eastern discipline on marriage, could not in any way have influenced Theodoret of Cyrrhus, Asterius of Antioch, Epiphanius of Salamis, John Chrysostom and Basil the Great. They lived, respectively 150 years before or even two-three centuries before

[32] JUGIE, pp. 447-458.

[33] MAXIMOS IV, *The Greek Melkite Church at the Council,* Boston, Sophia Press, 2014, pp. 344-347.

said Code. All that this Code did was to put in writing previous doctrines and practices, just as they were held by the Eastern Churches.

– The Eastern Churches have accepted this interpretation and practice on behalf of the innocent party for long centuries before the Great Schism (1054). The Roman Church never condemned them during the long centuries when they were united, nor were they ever condemned by the ecumenical councils, presided over by the representatives of the Bishop of Rome. This is an obvious proof that, until the present time, the Church never thought of opposing the legitimacy of the Eastern discipline in this matter.

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LEGAL DIFFICULTIES AND/OR IMPOSSIBILITY CONCERNING NEW FORMS OF CONSECRATED LIFE (C. 605)

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SUMMARY — This article examines the provisions of canon 605 from both a doctrinal and practical perspective, bearing in mind the passage of time from the promulgation of the new Code of Canon Law for the Latin Church together with later specifications of the subject in view of the post-synodal apostolic exhortation *Vita consecrata*. Far from bringing an end to the discussion in the doctrine in reference to the originality of the forms of consecration, this study is concerned with the new realities of the associations of the faithful among which very few have been approved by the Holy See. By way of conclusion, the A. presents possible solutions or, at least, an orientation to the problem in light of recent currents in the canonical doctrine.

RÉSUMÉ — Cet article examine les dispositions du canon 605 dans une perspective à la fois doctrinale et pratique et ce en tenant compte aussi bien du temps qui s'est écoulé depuis la promulgation du nouveau Code de droit canonique de l'Église latine que de précisions apportées ultérieurement par l'exhortation apostolique post-synodale *Vita consecrata*. Loin d'apporter un point final à la discussion doctrinale sur l'originalité des formes de vie consacrée, la présente étude porte sur les réalités nouvelles des associations des fidèles, dont très peu, jusqu'à maintenant, ont reçu l'approbation du Saint Siège. En guise de conclusion, l'A. propose des solutions ou, à tout le moins, des pistes d'orientation sur ce problème à la lumière des courants actuels en doctrine canonique.

Introduction

It has been thirty years since the promulgation of the new normative canonical text of the Latin Church, the 1983 Code of Canon Law. However, even

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today, questions remain concerning the *new forms* of consecrated life which, undeniably, in addition to those already recognised, could serve to increase the life and holiness of the Church. During this period of time, one finds in the canonical doctrine an abundance of contributions on this theme. Some authors have highlighted the serious difficulties, both theoretical and practical, regarding an adequate or precise technical-juridical framework for these new associative phenomena in accord with the requirements of the canonical treatment of institutes of consecrated life and societies of apostolic life (*De institutis vitae consecratae et de societatibus vitae apostolicae*).[1]

The *probati auctores* have not infrequently expressed their conviction of the real existence in the Church of associations of the faithful[2] whose members are *de facto* living a mode of true and proper consecration, although yet without a subsequent formal intervention by the competent ecclesiastical authority, something that is indispensable according to canon 605. Far from the pretext of concluding the debate on this subject which is so varied, complex, and even delicate, since it is not only relative to purely human aspects but, above all, to the spiritual gifts entrusted to the Church, our intention is to contribute to the discussion by means of some observations that may be worthy of use for the subsequent juridical development of the question.

1 — *"Sine Qua Non" Elements of Every Formal Form of Consecration*

To attain maximal clarity about this topic, the usual *explicatio terminorum* is not adequate. We need to put the problem into context, within which the legislation of the Church plays a relevant role. Firstly, it is apt to affirm that every form of Christian life, from a certain perspective, consists of a particular consecration to God: married life, priestly life, religious life. This reminds us of the origins of every consecration, namely, baptism, by which every Christian is consecrated so that later every baptised person can be consecrated by chrism, etc. Reflection on this also bears out the fact that, consequently, not to be excluded from consecration are Christian spouses who, by contracting a true marriage, are equally consecrated.[3] Such

[1] Cf. A. PEDRETTI, " Una prospettiva per le nuove forme di vita consecrata presente nel canone 605", in *CpR*, 80 (1999), pp. 155-175.

[2] Under this technical-juridical term "association" (cf. cc. 298-329), we mean groups, movements, confraternities, communities, families, fraternities, religious works, etc.

[3] Cf. Cf. PIUS XI, Encyclical Letter *Casti connubii*, 31 December 1930, in *AAS*, 22 (1930), p. 583.

consecration could not be denied to lay persons who are involved in various apostolic works, due to the fact that their precise mission involves full oblation, if not the very consecration of the person.

Through the centuries, and without creating excessive ambiguity, the term *consecration* referred only to those persons who were totally dedicated to the work of God and of the Church, which is the reason why the life they led came to be exclusively called consecrated, because it was lived in obedience, poverty, and chastity, a means of total oblation made to God. In this sense—and in the not too distant past—consecration began to be identified with religious life itself, implying a radical separation from what was considered "of the world" for the purpose of giving oneself totally to God.

With the birth of secular institutes in 1947, officially recognised and approved by *Provida Mater Ecclesia*,[4] this new and up to now unknown meaning was added to the term "consecration" following the necessary juridical precisions. The 1983 Code of Canon Law had to accommodate this reality which, undoubtedly, has brought about later specifications of a theological and juridical character inherent in consecrated life itself. Presently, legislation relative to the essential characteristics of every form of consecrated life recognised by the Legislator is found in the dispositions of canon 573. These constitute the necessary prelude to successive discipline regulating further aspects of a formal consecration.

1.1 — Theological Elements

We need to consider the norm that defines consecrated life in theological terms, taking into consideration that principles of the same nature will be applicable to other realities of consecration, even in the future. According to the language of canon 573 § 1, consecrated life is a stable form of life in which a person responds to a Trinitarian vocation, dedicating his or her life to the Father by following the Son in the Holy Spirit. We should clarify that such a dedication of oneself—for the honour of God and the edification of the Church—must have a new and/or original, or special, title. In addition, consecrated persons aspire towards the perfection of charity by a personal daily effort by which is proclaimed future glory and thus the eschatological event.

This way of life and commitment, be it individual or in community, is perfected through the profession of the evangelical counsels in the form of sacred bonds made according to universal and proper law. We ought to remind

[4] Cf. PIUS XII, Apostolic Constitution *Provida Mater Ecclesia*, 2 February 1947, in *AAS*, 39 (1947), pp. 114-124.

ourselves that the undertaking of such counsels through sacred bonds should be fully compatible with the status of the one who intends to be consecrated to God in this sense. It would not be admissible to have a status that would render impossible the effective practice of these counsels. We believe that, in any discussion of this topic, maximal relevance must be given to the profession of all three evangelical counsels of celibate chastity, poverty, and obedience. It follows that, if one of these counsels is missing, one could not speak about a true and proper consecrated life. This conviction is further emphasised by the apostolic exhortation *Vita consecrata* in numbers 62 and 63.[5]

1.2 — Juridical Elements

The legislative dimension inherent to institutes of consecrated life under the juridical-canonical aspect can be found in the disposition of canon 573 § 2. It should be noted, although it may seem evident, that in the future other possible forms of consecration should be defined as institutes of consecrated life provided that they satisfy all the juridical-canonical elements foreseen by the Legislator in this regard. We are speaking of an institute of consecrated life which is canonically erected by the competent ecclesiastical authority, in which the members profess the evangelical counsels through sacred bonds (vows, promises, oaths) and live a life in common, obeying the universal laws of the Church and, above all, the laws proper to themselves as elaborated by the institute to which they belong. This affirmation implies the existence of a fundamental code of life, formulated by the institute and approved by the Holy See, which guarantees the just autonomy of life, especially that of governance. We can further deduce that every institute of consecrated must be governed by an internal superior whose power should be determined not only by universal law but, above all, by the law proper to the institute.

We should note at this point that there are two categories of institutes of consecrated life typified by the Code: religious institutes and secular institutes. The juridical elements of the first category of institutes are the public profession of vows, a common life, and separation from the world.[6] Those features inherent in secular institutes differ from the former by the fact that the sacred bonds are not identified with public vows, that the consecrated laity do not always lead a common life and that, through their secularity,

[5] Cf. JOHN PAUL II, post-synodal apostolic exhortation *Vita consecrata*, 25 March 1996, in *AAS*, 88 (1996), p. 416.

[6] Cf. respectively cc. 607-709, 607 § 2, 607 § 3.

which is of the essence of such consecration, the sanctification of the world is realised *ab intus*.[7]

2 — *Forms of Consecrated Life in the 1983 Code*

While it may appear from previous observations that the following discussion might seem a simple task, we still need to highlight that the canonical Legislator systematises, even indirectly, two possibilities of consecration, having as their parameters the typical or at least effective realisation of what is foreseen in the law. In reality, it is a matter, according to the proposal of A. Neri,[8] of particularizing what this Code has formalized, taking into consideration the real modality of the individual or communitarian (associative) character of the consecration to God.

2.1 — Individual Character

Firstly, we should mention the example of eremitical/anchoritic consecrated life whose proper, yet generic, regulation is found in canon 603. This discipline of life, lived in a more rigorous separation from the world in solitude and in assiduous prayer and penance, implies the profession of the evangelical counsels. Hypothetically speaking, without this, the eremitical life would only be a form of private consecration or piety. In effect, that which juridically marks a consecrated hermit are the public sacred bonds as the form of the profession of the evangelical counsels which the subject must make in the hands of the diocesan bishop. Paragraph two of the same canon demonstrates the necessity of elaborating a personal plan of life[9] in which particular and detailed needs are presented together with the rights and duties that the subject assumes through this form of consecration.[10]

Regarding consecrated virgins, it is worth noting that the wording or, better, the Code's expression in c. 604 § 1, *ordo virginum*, leaves no doubt

[7] Cf. respectively cc. 710-713, 712, 714, 710.

[8] Cf. A. NERI, *L'Istituto unico maschile e femminile di vita consacrata*, Rome, Lateran University Press, 2002, p. 29.

[9] The six elements mentioned by the legislation are the compulsory requirements: recognition, assumption of the three counsels, vows and/or sacred bonds, public profession, a proper *ratio vivendi*, under the obedience of the diocesan bishop. Cf. D. ANDRÉS, *Le forme di vita consacrata*, Rome, EDIURCLA, 2008, p. 782.

[10] Cf. D. ANDRÉS, "Modelo de estatutos diocesanos para los rremitaños de una Iglesia particular," in *REDC*, 1987, pp. 163-203.

that this form of consecration is reserved only to virgins. The same Legislator, in referring to the juridical determination of the said form of consecration, uses the word *accedit*, which is why, when the other two evangelical counsels are missing, virgins do not acquire the status of a consecrated person *sic et simpliciter*.[11] In the celebration in which they promise to the diocesan bishop their holy intention of observing chastity, there is missing the other two counsels that are not even professed.

In § 2 of the same norm, the Code acknowledges virgins as having the right of association. This affirmation is in need of further comment. In the first place, notwithstanding the existence of this subjective *ius*, it is very rarely exercised not just because the special style of life to be followed involves solitude, but also because certain women with a relatively long experience in religious life who enter this form of the *sequela Christi* are frequently searching in their own service for distance from a formal community. Secondly, we should emphasise that the exercise of the above-mentioned law does not presuppose that associations of virgins be configured as new forms of consecrated life according to the provisions of canon 605.[12] It follows that every form of associated virgins must be considered as female associations of the the virgin-faithful as understood by canons 298-311. Analogously to what has been asserted, it seems correct to affirm that this special canonical status would be applicable also to widows who profess the vow of chastity.[13] This style of life, which always *accedit vitae consecratae formis*, brings together all the essential requirements of the other states, including, for example, the vigilance of the competent authority regarding the efficacious pursuit of the public ends of the Church.[14]

2.2 — Associative Character

The preceding reflections have enabled us to extract the essential, and also the juridically relevant, elements of both religious and secular institutes. Although fraternal life does not belong to the constitutive order of the secular institute, the Legislator nevertheless formalizes these institutes as *universitates personarum*. Having made the necessary clarifications as to

[11] There is no unanimous opinion in the doctrine on this affirmation. Cf. S. RECCHI, "Verbum accedere in cc. 604 e 731 Codicis. Quaesita et interpretatio," in *Per*, 78 (1989), pp. 453-476.

[12] Cf. T. RINCÓN-PÉREZ, sub can. 604, in J. I. ARRIETA (ed.), *Codice di Diritto canonico e leggi complementari. Commentario*, Rome, Coletti a San Pietro Editore, 2004, p. 450.

[13] Cf. C. M. MARTINI, "Decreto di istituzione dell'Ordo Viduarum Ambrosianus," in *Vita Consacrata*, 39 (2003), pp. 308-312.

[14] Cf. D. ANDRÉS, *Le forme di vita consacrata*, p. 795.

the legal requirements *sine qua non* of the institutionalized forms in a shape common to an institute of consecrated life, we must further say a few words on the apostolically associated life that is connected with consecrated life.

It is proper to make such an assimilation, but not identification, as the analogy between one and other form of life consists in the existence, at least in societies where the members take on the evangelical counsels, of a life in common and of the apostolic purpose that is extraneous to religious institutes, or even to secular institutes. What differentiates them, instead, is the absence of religious vows, which is the reason why societies of apostolic life can be, technically, called a form *ad instar Instituti vitae consecratae* and located by the Legislator in a part of the Code which is connected to the consecrated life.[15]

The same Legislator, in canon 731 § 2, stipulates that the members of apostolic societies assume the evangelical counsels through private bonds rather than sacred bonds. Therefore, we can affirm that the juridical elements indispensable for the foundation of a new society of apostolic life that is legitimately recognised are: its erection, private bonds, and proper laws given according to its specific charism. The similarities in the ends pursued between institutes of consecrated life and societies of apostolic life are undeniable, especially the aspect of the common life, and come close to being the same as the religious consecration.

According to the foregoing, the normative canonical framework, within which the Legislator circumscribes the new possible foundations of consecrated life and those that might be similar, is realised only when the constitutive elements have been satisfied. To such typical forms could be added other forms of consecration that are found in the proposal of Neri. Apart from those which have already been cited, Neri indicates diverse forms of associations, whether private or public, in which the members—including clerics, lay persons, virgins, hermits, or widows—profess the evangelical counsels through various sacred bonds.[16]

[15] It would not seem opportune, at least in this venue, to consider the complex nature of societies of apostolic life which, after long debates among the revisers of the new Code of 1983, have been systematised in a section on their own in respect to the true and proper institutes of consecrated life. Cf. CONGREGATIONF FOR INSTITUTES OF CONSECRATED LIFE AND SOCIETIES OF APOSTOLIC LIFE (CICLSAL), "Criteri per l'approvazione delle nuove forme di vita consacrata. Congresso del 26 gennaio 1990," in R. FUSCO and G. ROCCA (eds.), *Nuove forme di vita consacrata*, Vatican City, Urbaniana University Press, 2010, p. 267; G. GHIRLANDA, "L'esortazione apostolica *Vita consecrata*: aspetti canonici," in *Per*, 85 (1996), pp. 601-606.

[16] Cf. A. NERI, *L'Istituto unico*, p. 29.

Although acceptable in theory, in reality, the above-mentioned proposal may not, in part at least, seem as if it can be applied for a number of reasons. One reason would be the apparent, yet founded, contradiction between the *modus vivendi* of the communal character of the faithful in such associations and the theological-canonical essence of the vocation of the same as emerges from the example of the anchorites/hermits or the virgins. Rather, in the hypothesis where the members of these associations would be lay persons, once vows are professed, they would be regulated by the same law as a form of consecrated life, or an equivalent, unless the profession would be incompatible with the real canonical state of the member. We would highlight that such newness (relative to the form of a formal consecration, also by means of hypothetical normative combinations and thus through a connnection between the identifying elements of consecrated life)[17] could come true only when a form of consecrated life cannot be included without forcing it into one of the forms already foreseen by the Legislator and consolidated by canonical praxis. This would appear to be the current attitude of the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life (CICLSAL) regarding the eventual juridical approval of new forms of consecrated life.[18]

3 — *Canon 605*

Having clarified the presuppositions necessary to further understand the topic, it is fitting to enter into the merit of the actual question, namely, to set fire to the argument of the actual novelty of the form(s) of consecration as expounded in canon 605 and reaffirmed, under the expression *vita evangelica*, by the exhortation *Vita consecrata* number 62. By using this term, this Exhortation has introduced into the vocabulary (not only doctrinal) a certain ambiguity due to the fact that this pontifical text did not specify its content, above all its juridical content. This omission also concerns the connection

[17] This topic is noted in the doctoral thesis of Neri, where the author combines, by suppression or addition, the constitutive and essential elements of consecrated life. We see that the author does not mean newness in the sense of excluding; the forms are new because they do not belong in those seen by the canonical norms. Summed up, even if this proposal is plausible, we still have not seen any official approval by the Holy See in this regard. It is correct, though, to affirm that the existence of such realities would not be urgently necessary as the Holy Spirit would not have inspired any Founder to start such an absolutely original *modus vivendi*. Cf. A. NERI, *Nuove forme di vita consacrata (can. 605 C.I.C.)*, Rome, Editrice Pontificia Università Lateranense, 1995, pp. 77-94.

[18] Cfr. S. PACIOLLA, "Le nuove comunità. Precisazioni terminologiche e prassi del dicastero," in *Sequela Christi*, 2 (2011), pp. 222-223.

and/or the difference between the formulation *vita evangelica* and the term *vita consecrata* as used by the Legislator of the 1983 Code.

The associative phenomenon of the faithful occupies a not irrelevant part of the lived experience of Church, as the right to associate comes from the natural law.[19] Consequently, the application of the term *vita evangelica* as a new and possible form of consecrated life has to find precise systematisation in the constitutive aspect of the Church. To the Church pertains the previous discernment of the authenticity and genuine originality of the *modus vivendi* of these groups of faithful with a common life. For this reason, the above-mentioned new form could have a considerable relevance for the future, especially from the point of view of juridical solutions applicable to it.

In order to be more precise about the topic, we need to note that not all the associative phenomena in the Church which self-identify as *new forms* are truly such, just as not all groups of the faithful of an associative character with common life would be destined to become new institutes of consecrated life and/or societies of apostolic life. As it seems sensible to clarify the meaning of the expression *new forms*,[20] it is proper to question what type of newness is to be differentiated.

3.1 — Newness as Deformity of Necessary Requirements

The legislative portrayal of the forms of consecrated life and those similar to it leaves one to gather that newness cannot purely consist in a new foundation of an institute already regulated and anticipated by the Code, even though every foundation of an institute has both a spiritual newness and a richness for the entire Church. It appears that the meaning of newness as understood by the Legislator in canon 605 must have a rather stronger sense, namely, that it would be necessary to verify the existence of all the necessary requirements by which the Church, down through the centuries, admitted a determined form of consecrated life as a special gift of God and, above all, recognised it as a new way of sanctification for all who belong to it. Most probably, this has to do with assessing the authenticity of the inspiration and of the purpose that the new forms seek to accomplish. This verification must be done expressly through the previous discernment of the diocesan bishop and, subsequently, that of the Holy See.

[19] Cf. cc. 215 and 298 § 1.

[20] Both the adjective *new* and the noun *forms* bring about some perplexity. We are dealing with two words with various meanings which, in the canonical legislative language in the mind of canon 605, would make them even less comprehensible. Cf. V. De Paolis, *La vita consacrata nella Chiesa*, Venice, Marcianum Press, 2011, pp. 169-170.

We believe that if such inspiration is seen as authentic, conveying the special and specific *novum* with respect to the essential nature of consecrated life in general, this state of things would contribute to generating an effective renewal of religious life. Hypothetically, if this were to happen, the provisions of canon 573, which presents a law proper to all institutes of consecrated life, would be applicable. The same would be true when defining the original experiences and/or phenomena still in search of a precise identity in the Church.[21]

In this perspective, it is evident that spouses, notwithstanding the diverse forms of praiseworthy service that they undertake in various associations, movements, and ecclesial groups, cannot come under the category of *new forms*. As emphasized by the Second Vatican Council,[22] this conviction derives from the fact that their love is already consecrated through the sacrament of matrimony, which excludes the full duty of living and practicing all three evangelical counsels. It follows that the uniqueness in this case would consist in professing only two evangelical counsels in full observance of the chastity proper to the married state, without at the same time neglecting the responsibilities to their children.[23] However, such a form cannot be called consecrated life, true and proper.

In truth, following this line of reasoning, based on the hypothesis that the newness has to consist in the profession of only some counsels, one can only arrive at a misleading conclusion. This is because consecrated life cannot be exempted from its proper essence, which cannot be dispensed,[24] even if the case might reasonably justify it. It is difficult, therefore, to imagine what exactly is the newness with respect to the constitutive requirements of consecrated life.

3.2 — Newness as Structural Diversity

In reality, the difficulties that accompany the discernment of the absolutely necessary essentials of consecrated life are equally perceived in the formal classification of the associative phenomena of the faithful that would be defined as *new forms* as per canon 605. In this view, the newness of the form will consist in the search for juridical elements, which are indispensable for a possible canonical structuring, both internal and external, of the consecrated life. The question of the spouses, present in the form of an

[21] Cf. S. PACIOLLA, "Le nuove comunità," p. 223.

[22] *GS* 48.

[23] Cf. *VC* 62. The same doctrinal position was further confirmed during the Plenary Congregation of the CICLSAL in 2005. Cf. S. PACIOLLA, "Le nuove comunità," p. 226.

[24] Cf. c. 86 which prohibits the dispensation of that which is constitutive of a juridical institute or a juridical act.

aggregation of the faithful, presents a clear example of an evident technical-normative effort with the aim of being considered *new forms*.

At this point in time, the legislative framework requires from the members, whose intention would be to receive approval as a new form of consecrated life, to assume by some public sacred bond the three evangelical counsels, perhaps admitting other members as associates who would not assume the counsels or who would not take on all three.[25] In this manner, we would have newness in the sense of an original internal structure, which though not innovative, is indispensable, and has the basic theological content. This would not be seen as a strictly juridical innovation.

The archive of the CICLSAL has, at present, about thirty of these groups to which this dicastery has given the title *Ecclesial Families of Consecrated Life*. These could be classified as *new forms* under a purely structural aspect as mentioned above.[26] Of these thirty, only seven have received pontifical approval, as indicated in the *Annuario Pontificio* of 2012.[27] Without a solid and more profound investigation of the actual newness of these groups, and in order to reach the desired conclusion, it would be enough just to look at the title in the *Annuario* under which these realities are located: *Other Institutes of Consecrated Life*.

The more attentive canonical doctrine has made a profound analysis with the purpose of verifying if and how the desired originality is manifested, and it must proceed from the inspiration of the Spirit, as indicated in canon 605 and later reaffirmed by *Vita consecrata* number 62. The conviction that we are not dealing with the newness foreseen in canon 605 has since been successively confirmed by the work of the *probati auctores*. Unanimously and with obvious perplexity, they have asserted that the originality of such communities, compared to the forms existing thus far, could only consist in their unitary character in the sense of the union of the well-differentiated branches composed of men and women, clerics and laity, consecrated or not.[28]

[25] Cf. S. PACIOLLA, "Le nuove comunità," p. 226.

[26] *Ibid*., pp. 224-225.

[27] Cf. *Annuario Pontificio 2012*, Vatican City, Libreria Editrice Vaticana, 2012, pp. 1700-1701.

[28] For example, the *Missionary Fraternity Verbum Dei*—approved by the Holy See in 2000 as an institute of consecrated life and made up of various branches: clerical branch, branch of unmarried lay women, together with a branch of families, consecrated as per their proper state. The same can be said referring to the *Opera della Chiesa*—founded in 1963—approved by the Holy See in 1997.
Doctrinal comments that we would recommend are as follows: G. GHIRLANDA, "Movimenti ecclesiali e Istituti di vita consacrata nella Chiesa e nella società di oggi", in *Per*, 101 (2012), pp. 45-47; V. DE PAOLIS, *La vita consacrata nella Chiesa*, pp. 182-186; L. SABBARESE, "La questione dell'autorità e le nuove forme di vita consacrata", in *Per*, 97 (2008), pp. 408-418.

Endeavouring to understand better each of these sources taken together, that is, the Code, the praxis of the CICLSAL, and number 62 of *Vita consecrata*, we see that, at the internal structural level, there is a *new form* defined as an *Ecclesial Family of Consecrated Life*.[29] However, no other newness is discernible. With regards to the eventual approval of such phenomena and/or experiences, *Vita consecrata* has ordered that a proper commission be set up to work out valid criteria, besides those already proposed in the Exhortation, for an institutional verification of the authenticity and absolute originality of such forms. Up to now, the commission, if created, has not as yet furnished any practical and adequate elements for this question, demonstrating the real difficulty, if not impossibility, of putting these phenomena in a theological-juridical framework that purportedly could be defined as *new forms* of a formal consecration.[30]

4 — *Doctrinal Debate*

In the doctrine, a heated debate has begun regarding the significance of employing the expression *new forms* but also, given an objective difficulty that is not exclusively juridical, on the theme of possible efficacious solutions to the question. This discussion has not only sought to put forward proposals on the subject but is also concerned with the interpretation of canon 605. This canon has shown itself to be a true *crux interpretum*, because its generic physiognomy has provoked objective problems of content.

[29] S. Paciolla, Under-Secretary of the CICLSAL, lists the criteria to be identified as *Ecclesial Families*, elaborated by the same Dicastery. "a). Unique juridical institutional subject which can have various denominations (e.g., communities, families, fraternities, institutes, works) formed by: b). Two main branches of consecration: celibate male (clerics and non-clerics) and unmarried women who take on the evangelical counsels with public vows or other sacred bonds, but not the members *pleno iure*; c). Lay, single, and married associate members, who are not *pleno iure* members. They (…) have to have a proper state with norms that take into account the internal organization and the relationship with the institute; d) the government: the main branches have a proper structure, endowed with a certain autonomy, with a President that has authority (to be established) over the entire *Ecclesial Family*. The President is assisted by the Superior Generals of both main branches and by their respective Councils; e) the President can be male (cleric and non-cleric) or female. If the President is not a cleric, the faculties of the Ordinary belong to the Superior of the male branch who has to be a cleric; f) with diocesan approval, the clerics can then be incardinated in the institute." S. PACIOLLA, ,"Le nuove comunità", pp. 224-225.

[30] Cf. S. PACIOLLA, "Le nuove comunità", p. 224.

It is not up to this study to single out other problems[31] that have arisen in the course of the doctrinal analysis of this norm as, for example, the competence at the level of the Holy See for the approval of *new forms* born and concretized in a particular diocese. What is taken up, instead, are the actual doctrinal suggestions concerning the juridical concretization of *new forms* of consecrated life. The aim is to determine if and how such individual and/or institutional forms could be regulated through already existing norms or whether they would require some new legislative provisions that are currently non-existent. The doctrinal endeavor is substantially articulated in two tendencies of a somewhat opposing character.[32]

4.1 — The Position of Domingo Andrés

The interpretation of this uncertain canon (c. 605) occupies a particular role in the doctrinal thought of the Spanish canonist, Domingo Andrés. While affirming the existence of the objective theoretical-practical difficulties of the norm, he maintains that the canon could be interpreted as the canonical statute (*statuto canonico*), although *sui iuris*, of the *new forms* of consecrated life.[33] Andrés is of the opinion that this norm would be sufficient to regulate all those aggregative realities and/or phenomena that have at least the propensity of becoming a *new form*.[34] This very conviction is further supported, he believes, through the existence and pontifical approval of

[31] For example, the argument relative to the nature and exercise of power in such forms or in topics concerning the formation of future priests. Cf. respectively L. SABBARESE, "La questione de l'autorità e le nuove forme", pp. 403-404; G. ROCCA (ed.), *Primo censimento delle nuove comunità di vita consacrata*, Vatican City, Urbaniana University Press, 2010.

[32] In view of its lack of importance and effect on the doctrine, omitted is the opinion of R. Henseler who postulated that the newness could consist in the practice of only two evangelical counsels, especially in the context where the important part of a new form would be formed by spouses with children. However, we really cannot speak of a true and proper consecrated life where the commitment to perfect continence in chastity is lacking. Cf. R. HENSELER, sub can. 605, in *Münsterischer Kommentar zum Codex Iuris canonici*, vol. IV, Essen, Ludgerus Verlag, 1985.

[33] D. ANDRÉS, *Le forme di vita consacrata*, p. 804; " Nuove forme di vita consacrata. Statuto teologico-canonico secondo il Codice", in *CpR*, 87 (2006), pp. 65-76.
By *statuto canonico* is meant the body of laws that determine the canonical-juridical condition of persons according to their diverse circumstances and status (e.g., infants, spouses, religious, persons in their place of domicile, etc). It is the position of Andrés that c. 605 is a *statuto canonico*, a theological-canonical norm that is adequate for the regulation of any new form of consecrated life. The canon is *sui iuris* in that it is autonomous, with no other precedents or comparisons.

[34] Cf. D. ANDRÉS, *Le forme di vita consacrata*, pp. 809-810.

the seven institutes of consecrated life found in the 2012 edition of the *Annuario Pontificio*.

Certainly, the analysis of Andrés is worthy of attention, in part because he concentrates on the person and role of the diocesan bishop throughout the whole discernment process. In addition, he considers the CICLSAL as the competent authority to deal with and approve such realities, not the Roman Pontiff personally. However, the horizon within which the author proposes such solutions is that of the common norms already prescribed by the Legislator in Book II, Part III, Title I of the 1983 *CIC*. Only in this sense should the newness be understood that would have sprung from divine inspiration with the intent of becoming a *new form* and that would want to be actualized as such.

It is our opinion that the proposal of the canonical statute *sui generis* as law for these phenomena, though original yet not unique to the Johannine-Pauline Code,[35] does not define the precise position of the *new forms* in respect to those already in existence in the sense that it does not offer or provide the theological and juridical elements relative to such newness. It is a law but, all things considered, it lacks essential content. For, the seven institutes, whose regulation would be included in canon 605 and subject to the discipline of this norm, have been approved and characterised in virtue of the legislative provisions common to all forms of formal consecration present in the *Codex*, not by legislation outside the Code.[36] Andrés is, however, convinced that the current discipline, at least of juridical character, does not need any further legislative intervention, even if only *ad experimentum*.[37]

The same thinking, or better still, its further development, more in theory than in practice, is shared by the above-mentioned Neri. His doctoral thesis attempts to identify the *new forms* as distinct from the existent ones, including associations, establishing as criterion the subtraction or addition of the elements that are constitutive and common to all forms of consecrated life that are already consolidated. In the conclusion to his work, the author defines his results as a mere hypothesis of a work and research that is "open to criticism and evolution."[38]

[35] See c. 206 on catechumens, which is also the only canon providing a "canonical statute" for them. We speak of "canonical statute *sui generis*" to emphasize that it is atypical.

[36] Cf. V. DE PAOLIS, *La vita consacrata nella Chiesa*, pp. 178-179.

[37] Cf. D. ANDRÉS, *Le forme di vita consacrata*, p. 811. The weakness in the doctrinal position of the author does not come from the slight strength of the argument but rather the scanty compatibility manifested in the reality of the facts. Our criticism is echoed in the scientific studies of other canonists. Cf. V. DE PAOLIS, *La vita consacrata nella Chiesa*, pp. 176-179.

[38] A. NERI, *Nuove forme*, p. 185.

4.2 — The Position of Velsasio De Paolis

According to the doctrinal position of Velasio De Paolis, it is to be noted that this author, after having clarified the type of newness that the Code requires,[39] determines the field of study, that is, he makes distinctions in a series of arguments whose careful consideration brings us to deduce that the place for this inquiry about newness would have to go beyond the provisions of the Code. Besides the convincing quality of his arguments, his interpretation of a canon (c. 605), which is so generic and uncertain in its basic juridical content, cannot but imply, in all honesty, a certain dose of intuition on his part.

De Paolis affirms that the newness of the new forms must be different from the genus of the institute of consecrated life as depicted in the Code; they must be a distinct species of it. They cannot therefore be regarded as the present forms of consecrated life, whether associative or not, because these are already provided for in the law. In reality, they are considered in practice today as true and proper institutes of consecrated life, not a new form of it.

De Paolis also highlights the lack of identification of the pontifical subject competent to approve *new forms*, as presented by *Pastor bonus*. In reality, this Apostolic Constitution on the Roman Curia, promulgated five years after the Code, literally repeats universal norms: those on the regulation of the evangelical counsels and their effective exercise within the already approved forms,[40] on the erection and/or suppression of religious and secular institutes and societies of apostolic life,[41] on the eremitical life and the *ordo virginum*,[42] etc. Moreover, article 110 of *Pastor bonus* mentions that they are subject to CICLSAL like the other forms of consecrated life.

Far from being excessively scrupulous, De Paolis questions the absence in *Pastor bonus* of the term *new forms*, whether this omission was due to the Legislator's intention to preserve the utmost precision and/or simply to repeat what is already given in universal law. De Paolis, however, thinks that this term should be utilised.[43] The author, moreover, highlights the idea that the newness, which the Legislator had in mind when drafting the new legislative texts of the Latin Church, consists in such forms that "no longer reflect the theological and juridical elements required by canon 573."[44]

[39] In the form of a likely hypothesis. Cf. V. DE PAOLIS, " Le nuove forme di vita consecrata e le nuove forme di vita monastica", in *Sequela Christi*, 2 (2005), pp. 138-163.

[40] Cf. *PB* 105 and c. 576.

[41] Cf. *PB* 106, §1 and cc. 589, 579, 583, 584, 616 § 3.

[42] Cf. *PB* 110 and cc. 603, 604.

[43] Cf. V. DE PAOLIS, *La vita consacrata nella Chiesa*, p. 181.

[44] *Ibid*.

Anticipating what may develop from the reflections that have been presented thus far, we can say that it is not a given that the *new form* has to be configured as an institute of consecrated life. Such also seems to be the intuition of De Paolis. Currently, the newness that is discovered from a theological-juridical analysis of *Ecclesial Families of Consecrated Life* consists only in the ways—unknown up to a decade ago—of living the religious life which, however, do not have the constitutive elements of canon 573.

The newness of the formal consecration could pertain to those forms whose regulation is in need of a new legislative framework.[45] It follows that the intervention by the Legislator is necessary to be able to produce new juridical institutes capable of shaping such laws from which they could derive the new identifying elements of their consecrated life without prejudice to its theological-spiritual nature that remains unchangeable. In order to specify *new forms*, it would therefore no longer be necessary to classify them by subtraction or addition, that is, their individuality would no longer be made in an exclusive or inclusive sense, which in every hypothesis would be misleading.

4.3 — Personal Position

The moment has arrived to present our own opinion on this topic. It should be noted that we cannot be content simply with any juridical solution. Hence, we make the following proposals.

Attentive to the previous reflections, especially those concerning the *Ecclesial Families of Consecrated Life*, it is necessary to begin with this observation: the Second Vatican Council has been perceived, not without reason, as the assembly capable of bringing about a true and proper charismatic discernment of the ecclesial life or a self-reflection on the Church's essence.[46] This also goes for the legislative project of the Latin Church. At the moment of the Council's closure, such a project was seen to be more than necessary. In other words, it is more than likely that the Commission for the revision of the new Code, still having in mind the spirit of the Council and its openness to the new yet undefined gifts of the Spirit, had proposed for the new law the existence of the norm which became canon 605, which currently generates more problems of various types than it offers practical advantages.

[45] *Ibid*., pp. 181-182. Contrary to this thought is that of D. ANDRÉS, *Le forme di vita consacrata*, p. 811.

[46] Cf. *LG* 12.

It follows that this Commission, with regards to consecrated life, acting with prophetic prudence, decided to reinvigorate the forms of consecration that were already consolidated and also not to exclude originality in the manner of living them. This conviction is based on the aforementioned canon 605. What we need to affirm is that the discernment effort on the part of the competent authority regarding *new forms* has to consist of an analysis of the original project of the Founder and, thus, in a deepening of the proper foundational charism.

We need to recall that the formalization, including the juridical, of the secular consecration was absolutely non-existent under the regime of the Pio-Benedictine Code. It came into being and began to be officially regulated only after 1947 and later entered into the normative framework of the 1983 Code. It is evident that the Legislator—in the hypothesis of an original form of living a life of chastity, poverty and obedience—supplied special norms in order to give life in legal terms to the gift of the Holy Spirit, which previously had been undergoing a profound discernment.

Consecrated secularity was exhausting the existing normative framework. The provisions lacking in the 1917 Code for this form resulted in its not being able to be legitimately recognised. The identifying criteria of formal secular consecration that came to be developed were inspired by the legal provisions relative to the law for religious in the 1917 Code.[47] It was only after *Provida Mater* that such forms began to be regulated by means of fundamental and special laws.

Currently, all the associative phenomena of the faithful, even those with the intent of becoming *new forms* of consecrated life, are regulated by the norms in force in a hybrid manner, as confirmed by the praxis of the CICLSAL. In other words, the canonical regulation of the new realities uses the existing juridical institutes but combined in such a way as to make a unique functioning reality with a generic name, that is, *Families of Consecrated Life*.

Lacking specific and useful criteria by virtue of which it would be possible to approve *new forms*, it would seem that the perfecting of these norms would be achieved only at the level of new institutes as *Ecclesial Families* without, however, any notable and desired progress to the *mens* of canon 605. This is because, currently, there are no criteria given by the CICLSAL nor are there any laws allowing the identification, discernment, or approval of an original form of living the state of consecration to God. As just stated, *a fortiori* of the doctrinal position held by De Paolis, we believe that only

[47] Cf. T. RINCÓN-PÉREZ, *La vida consagrada en la Iglesia latina*, Pamplona, Ediciones Universidad de Navarra, 2001, pp. 40-41.

the intervention of the Holy See could provide a new normative framework to regulate juridically *new forms* of consecration or, at the very least, could make substantial changes to what is already provided in canon 573.

Conclusion

Based on the doctrinal material, the analysis given up to this point has highlighted what could be configured as *new forms* of consecrated life. However, the *praxis* of the dicastery competent to approve such realities is quite different in the sense of defining them as new institutes of consecrated life, excluding every proper specific quality to each associative phenomenon of the faithful. Both the CICLSAL and the recent doctrine proceed with much prudence in the process of the juridical formulation of these realities. This manifests at the same time the basis of the problem and thus the dilemma between charismatic originality and structural adaptations with respect to forms of consecration already tested.

The question remains open to possible solutions of a juridical nature. It awaits, above all, the gifts of the Spirit which, however, have to be embraced by men and women and then reasonably ordered until they can best serve the development of the common good of all the *christifideles*. We are of the opinion that, apart from the idea of bringing this debate to an end, the process of the reception of new charisms in consecrated life, and of their necessary regulation in the juridical sphere, has to proceed with due prudence and, not infrequently, with reserve. One could speculate that a more satisfying response to the theme proposed in the title of this present question could be resolved in terms which are not necessarily technical. That is, the setting of this discourse might consider an examination of the real need for and/or urgent necessity of *new forms* of consecrated life. For, it would dispel the presumption that consecrated life, as organized and functioning in our times, is no longer capable of responding to its own primary function. It is equally probable that we are not capable of attentively reading the gifts that the Spirit continuously gives to the Church, or that the time for *new forms* of consecrated life has not yet arrived. *Ius sequitur vitam*. In this sequence of events, we need, lastly, to attribute an opportune *nomen iuris* to every reality or phenomenon that may be seen as a *new form* of consecration.

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WITH ALL YOUR HEART

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SUMMARY — The relationship between canon law and the human heart may not be an obvious topic. It is nonetheless a necessary subject of reflection if we are to implement the ecclesiology of Vatican II as the revised Code set out to do. This leads us to reflect on what might have been the aim behind Pope Paul VI's proposal for a *Lex fundamentalis Ecclesiae*. More importantly it calls on all members of the Church to see their lives in the light of the commandment of love on which the law and the prophets depend. For canon law as for everything in the Church it poses the challenge of how the Church's laws and structures can be at the service of the mystery which, as Pope Francis recently remarked to the bishops of Brazil, "enters through the heart".

RÉSUMÉ — Les relations entre le droit canonique et le cœur humain ne sont pas nécessairement évidentes. Elles constituent néanmoins un sujet de réflexion nécessaire si nous devons mettre en œuvre l'ecclésiologie de Vatican II, comme le Code révisé se proposait de le faire. Nous sommes ainsi amenés à réfléchir sur l'objectif que poursuivait le pape Paul VI lorsqu'il proposait l'adoption d'une *Lex fundamentalis Ecclesiae*. Ce qui est encore plus important, c'est que le texte en question invite tous les membres de l'Église à voir leurs vies à la lumière du commandement de l'amour, dont dépendent la loi et les prophètes. Pour le droit canonique, comme pour tout le reste dans l'Église se pose le défi suivant: comment les lois et les structures de l'Église peuvent elles être mises au service du mystère, le mystère qui, comme le pape François le notait récemment dans son adresse aux évêques brésiliens, « entre par la voie du cœur » .

Introduction

The relationship between canon law and the human heart might not be the first topic that would spring to mind for a canon law conference. Perhaps

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it should be! The law and the heart are explicitly associated in the most central scriptural words about law:

> "You shall love the Lord your God with all your heart, and with all your soul, and with all your mind." This is the greatest and first commandment. And a second is like it: "You shall love your neighbour as yourself." On these two commandments hang all the law and the prophets (Mt 22: 37-40).

The text begins with one of the most familiar sayings in the Hebrew Bible (Dt 6: 4-9); words which the pious Jew prayed every day, words which, as Pope Benedict XVI put it, "expressed the heart of his existence."[1] Those words, the *Shema Israel*, are still central to Jewish prayer and Jewish life. And Jesus tells us that what is expressed there are the two commandments on which all law depends.

So it is worth reflecting on the link between canon law and the heart of the believer. I would venture to say that one of the problems for canon lawyers in attempting to explain the importance of your work is that, for the most part, the link between canon law and the deepest yearnings of the human heart is not obvious. Indeed some people would assume that they are entirely unconnected, if not in complete opposition.

If I may digress, this is not just a problem for canon law. In a highly secularist society like Western Europe the real challenge for religion is to find a way of touching hearts. Our society increasingly deals with the surface of things and drowns out the silence which is needed in order to explore the mystery which we inhabit and which we are.

Pope Benedict XVI spoke a couple of years ago about the parable of the two brothers who were asked to work in their father's vineyard (Mt 21: 28-32). One agreed but did not go; the other refused but then thought better of it and went. Jesus drew a hard lesson from that parable for the chief priests and elders, who saw themselves as respected leaders of the people. He compared them to the first brother, all words and appearances but no action. He told them that the tax collectors and harlots would enter the kingdom of heaven before them. Pope Benedict XVI went on:

> Translated into the language of the present day, this statement might sound something like this: agnostics, who are constantly exercised by the question of God, those who long for a pure heart but suffer on account of their sin, are closer to the Kingdom of God than believers whose life of faith is "routine" and who regard the Church merely as an institution, without letting it touch their hearts, or letting the faith touch their hearts.[2]

[1] POPE BENEDICT XVI, *Deus Caritas est,* 1 (= DCE).

[2] POPE BENEDICT XVI, Homily, Freiburg im Breisgau, 25 September 2011.

One reason why canon law in particular is seen as not touching our hearts and indeed having little or nothing to do with our hearts is that, like any legal system, it is not primarily concerned with people's private thoughts, or what goes on in their hearts, but rather with their observable actions. Edward Peters says:

> Canon law, like every legal system, is concerned primarily with protecting the smooth order of the society that it serves—in this case, the society known as the Catholic Church… Contrary perhaps to popular impression; the operation of canon law is almost always limited to matters which concern the external conduct of Church members.[3]

In contrast, the *Catechism of the Catholic Church* in its profound passage on the heart as the source of prayer and the place where God's thirst for us meets our thirst for God, describes the heart as being at the centre of what we might call our interior life*:*

> The heart is our hidden centre, beyond the grasp of our reason and of others; only the Spirit of God can fathom the human heart and know it fully. The heart is the place of decision, deeper than our psychic drives. It is the place of truth, where we choose life or death. It is the place of encounter.[4]

So the heart is beyond the reach even of a person's own introspection, not to mind what others can see of us. It is, therefore, well beyond the reach of even the most zealous lawyer!

That is the first and most obvious gap between canon law and the heart, or, if you like, between canon law and the encounter with God. The heart is concerned with something deeper than external activity, and yet it must of course have something to do with the smooth order of the Church and with loving one another as Christ loves us.

1 — *St. Paul and the Law*

No human law can exhaust the implications of responding to our Creator and Redeemer with all our heart and mind and strength. In fact, no law could exhaust the implications of loving another human being. One would not be too hopeful for a marriage where one partner said, 'these are the rules I will observe in my dealings with you and don't expect anything more". From one point of view this gap is what is expressed in St Paul's polemics about the Law. It was not that he had any doubt about the importance of the

[3] http://www.canonlaw.info/a_canonlawyersarearent.htm

[4] *CCC* 2563

law, but he could see the traps that opened up for people who looked no further than expressions of the law, however profound and however admirable.

There were those, like the Pharisee in the parable, who thought that by keeping every jot and tittle of the law they could put themselves in a position where God would be lost in admiration at their great achievement. This resulted in a comprehensive missing of the point as the parable makes clear.

When that happens, then as one scripture scholar put it: "the individual's aim is ultimately to secure some hold on the divinity, to make a just God obligated to render earned rewards and requite merited blessings."[5] In other words, if one were to think of the law, with no reference to the heart, the temptation would be to reduce our relationship with God to a series of rules which, if we obey them, would leave God with no further demands on us.

In the Epistle to the Galatians, St. Paul addresses the question of circumcision and of Christians who had submitted to circumcision. He stresses that circumcision is of no consequence in the new dispensation: "In Christ Jesus, neither circumcision nor uncircumcision counts for anything; the only thing that counts is faith working through love" (Gal 5:6). He recognises, on the other hand, that circumcision might have a useful role in persuading Jews to see that the Gospel is not something alien to their tradition, and so he had Timothy circumcised before taking him with him on a missionary journey (Acts 16: 3). And yet he speaks very harshly to some of those who have been circumcised: "Listen! I, Paul, am telling you that if you let yourselves be circumcised, Christ will be of no benefit to you" (Gal 5:1). He is critical, not because they had been circumcised but because of *why* they had been circumcised: "You who want to be justified by the law have cut yourselves off from Christ; you have fallen away from grace" (Gal 5:4).

What is important is not whether they are circumcised or uncircumcised but how they understand the law. They want to be justified *by observing the law* and appear to feel that obeying the law of circumcision, even though it no longer applies to them, will give them some kind of insurance, some kind of entitlement vis-à-vis God, an entitlement based on their actions rather than on God's gift. He accuses them of thinking, in a way which shows that they have not really put their trust in the one thing that counts, faith working through love.

That is the first gap between the law and the heart of our relationship with God. The law can be turned into an obstacle, a new kind of burden, an

[5] S. B., MARROW, *St. Paul, His Letters and His Theology*, New York, Paulist Press, 1986, p. 96.

attempted bargain with God, instead of the Law of Love, which is a law of freedom:

> For you were called to freedom, brothers and sisters; only do not use your freedom as an opportunity for self-indulgence, but through love become slaves to one another. For the whole law is summed up in a single commandment, "You shall love your neighbour as yourself" (Gal 5: 13-14).

The gap between the law and the heart that we see in the parable of the Pharisee and the tax collector shows that the Law of Moses can be misused as a way of claiming an entitlement from God. That danger arises in relation to any system of codified law. The Pharisee's fault lies in thinking that *anything* he could do would free him from the total dependence which everyone has on God's mercy.

Jesus points to another way that gap can open up. You can fulfil the rule completely while denying the spirit that makes sense of the rule:

> You have heard that it was said, "You shall not commit adultery." But I say to you that everyone who looks at a woman with lust has already committed adultery with her in his heart (Mt 5: 27-28).

He makes a similar point when he speaks of obligations which no reasonable code of laws could ever impose. The underlying meaning or spirit of the law may urge a person on to actions and attitudes far beyond what any law could impose as a strict obligation:

> … if anyone strikes you on the right cheek, turn the other also; and if anyone wants to sue you and take your coat, give your cloak as well; and if anyone forces you to go one mile, go also the second mile (Mt 5: 38-41).

The written law can never be an adequate expression of the love which comes from our whole heart and soul and might. Any attempt to express all the possible manifestations of love in a legal formula would lead to nonsense. The profit from stealing coats would be doubled if you had to throw in your cloak as a bonus! Yet one can easily imagine a situation in which that is precisely what a saint would do.

The point I am making is that it is important to place the law in the context of its true meaning in the life of the Church. The Christian life is more than a question of conforming to a code of written rules. Paul says, "The letter kills, but the Spirit gives life" (2Cor 3: 6). And St. Thomas Aquinas adds, "Even the letter of the Gospel would kill if the saving grace of faith is not present within."[6]

[6] Cf. Thomas AQUINAS, *Summa theologiae* I-II, q. 106, a 2.

Pope Paul VI commented on that text of St. Paul, saying that while the letter should never be opposed to the spirit, every law requires the letter—a clear written exposition. He went on to say that such exposition is particularly clearly found in the Code of Canon Law.[7]

Any formulated rule could never be the whole of the moral call of the Christian. Another indication of that is that any formula of law can quite often be "circumvented" by skilful interpretation. Indeed that is perhaps the most valuable skill that the clergy in the trenches attribute to canon lawyers! After years of depending on canonical advice, I recognise that it can be a very important skill indeed.

But the person who really understands what law is about will not have as their first question, "Is there some way I can get out of this?" They would at least begin by saying, "There is some reason, based on real experiences, why the law is as it is. I need at the very least to understand why that is so, before I think of trying to get around it."

2 — *The 1983 Code and the Lex Ecclesiae fundamentalis*

If canon law, like any legal system is about concern for the smooth order of the society which it serves it must, of necessity, involve an underlying concept of what the society is and what it seeks to achieve. This concept is quite explicit in the case of the Code. The revision of the Code was an exercise at the service of, and springing from, the ecclesiology, the understanding of the Church that was one of the principal fruits of Vatican II. As Pope John Paul II wrote:

> the Code is in no way intended as a substitute for faith, grace and the charisms in the life of the Church and of the faithful. On the contrary, its purpose is rather to create such an order in the ecclesial society that, while assigning the primacy to faith, grace and the charisms, it at the same time renders easier their organic development in the life both of the ecclesial society and of the individual persons who belong to it.[8]

So this is a law which assigns the primacy to the faith, grace and charisms, that is to the love of God which "has been poured into our hearts through the Holy Spirit that has been given to us" (Rom 5: 5). Its purpose is to enhance the organic development of these realities. Pope John Paul II went

[7] Cf. POPE PAUL VI, *Address to the Pontifical Council for the Revision of the Code of Canon Law*, 20 November 1965 (= PAUL VI, APC).

[8] POPE JOHN PAUL II, *Sacrae Disciplinae Legis* [= SDL].

on: "this new Code could be understood as a great effort to translate… the conciliar ecclesiology, into canonical language."[9] The Code is not merely a collection of rules; it is an attempt to translate the Council's vision of the Church in such a way as to foster the organic life of the community and of its members, the community whose nature and mission is described in *Lumen gentium* and throughout the Council documents.

In promulgating the Code, Pope John Paul II pointed out that there are clear ways in which the Code seeks to present "the true and genuine image of the Church" in the light of the Council:

> the doctrine in which the Church is presented as the People of God (cf. *Lumen Gentium*, no. 2), and authority as a service (cf. ibid., no. 3); the doctrine in which the Church is seen as a "communion," and which, therefore, determines the relations which should exist between the particular Churches and the universal Church, and between collegiality and the primacy; the doctrine, moreover, according to which all the members of the People of God, in the way suited to each of them, participate in the threefold office of Christ: priestly, prophetic and kingly. With this teaching there is also linked that which concerns the duties and rights of the faithful, and particularly of the laity; and finally, the Church's commitment to ecumenism.[10]

There is no doubt that the text of the Code in various places does that very well. One thinks of the robust statement about the primacy of the baptismal calling on which all others are based:

> Flowing from their rebirth in Christ, *there is a genuine equality of dignity and action among all of Christ's faithful*. Because of this equality, they all contribute, each according to his or her own condition and office, to the building up of the Body of Christ (c. 208, my italics).

There is also, for instance the definition of a parish which does not start from the pre-eminence of the pastor, but from the community that he shepherds:

> A parish is a certain community of the Christian faithful stably constituted in a particular church, whose pastoral care is entrusted to a pastor (*parochus*) as its proper pastor (*pastor*) under the authority of the diocesan bishop (c. 515 §1).

When the Code was being prepared many of those involved thought that these principles would not simply be stated within the Code, or in the document by which it was promulgated, but would be part of a *Lex Ecclesiae fundamentalis,* superior to both the Latin and the Eastern Codes and indeed

[9] Ibid.
[10] Ibid.

to all ecclesiastical law. Pope Paul VI raised this issue himself and began a process towards developing such a foundational law.

You would know better than I the complex discussions of the c*oetus consultorum specialis* and of canonists in general which concluded with the proposal being dropped and the issues being at least partly integrated into the new Codes. And you would have more informed opinions than I as to whether such a proposition would have been a positive development.

I mention it here because I suspect that part of the reason why it would be so difficult to formulate lies in the topic that I have rather rashly agreed to talk about. How can one express, in a single document, legislation, however fundamental, and, at the same time, formulate the most profound theological considerations that touch the human heart where we encounter the Lord?

The truth about being a Christian is founded on a personal encounter. Pope John Paul II sought to recognise the issue by pointing to the ways in which the Code reflects the ecclesiology of Vatican II, and some of the principle elements of that ecclesiology. It may be that the only way to achieve the kind of balance Pope Paul VI sought is for everybody involved with canon law prayerfully and continually to think through the question of how law and heart relate, as I am trying to do in a very limited way, rather than by trying to construct a fundamental document which is trying to be both theology and law. I suspect that the project could not work unless it included and was based on a deep understanding of the relationship between the heart of Christianity and the law in which one sought to translate it. One can see the benefits that Pope Paul VI saw when he proposed a process that would prepare a fundamental law, deeper than the specific canons of the Code:

> A particular and serious question arises here, because there is a two-fold Code of Canon Law for the Latin and Eastern Church, namely whether there should be a common and fundamental Code containing the constitutive law of the Church.[11]

3 — *What is Law?*

Perhaps the way to approach a reflection on the issue would be to begin by recognising that we Christians use the word ‘law’ in at least two different but related senses. The Jewish *Torah* was not simply a system of laws. The

[11] POPE PAUL VI, APC.

word refers to everything in the Hebrew Bible except the prophets. So the New Testament, and indeed the statement of Jesus with which I began, speak of "the law and the prophets". The *Torah* is the word of God expressed not just in laws but in the whole history of Israel in which God formed and spoke to his people.

This is the law which is acclaimed so enthusiastically in Psalm 119, which in each of its 176 verses proclaims that God's Law is more wonderful than silver and gold, the source of the peoples' delight. At the Lenten Retreat given in the Vatican in 2013, Cardinal Ravasi said:

> This immense alphabetic canticle—which the philosopher and believer Pascal recited every day—celebrates the beauty and the power of the word of God which is called also 'law, witness, judgement, saying, decree, precept, order'. A true spirituality should, therefore, base itself always on the word of God.[12]

In a Christian sense, this corresponds to what we might call the *Torah* of the New Covenant. The law and word of God, for the Christian, are inextricably linked to the New Covenant as the law and word of the Old Covenant were linked to the Mosaic Covenant.

Pope Paul VI thought of "a common and fundamental Code," which would be superior to all other codified law in the Church and for which there might well be a role, if only to express a fundamental unity underlying the "two-fold Code." But when he asked "*num conveniat communem et fundamentalem condi Codicem, ius constitutivum Ecclesiae continentem*"[13] it would seem he was thinking of a *Lex fundamentalis* in a deeper sense—a theology, an ecclesiology, a *Torah,* a scriptural understanding of law, rather than law in the sense of rules. Only something like that could properly be called a *ius constitutivum.*

This broad "*Torah* of the new Covenant" is not perhaps something to be written in a 'constitutional' document, and that may have been the problem. Nevertheless, without such a foundation the Code, indeed everything in the Church, would lose sight of its purpose. Canon law is essential for smooth order in the Church. But it is not the foundation of that order; the foundation is Christ and the New Covenant. Perhaps we could return again to the *Catechism*:

> 2062. The Commandments properly so-called *come in the second place*: they express the implications of belonging to God through the establishment of the covenant. Moral existence is a response to the Lord's loving initiative.... (My italics)

[12] G., Ravasi, *L'Incontro, Ritrovarsi nella Preghiera*, Mondadori, 2013.

[13] Pope Paul VI, APC.

> 2063. The covenant and dialogue between God and man are also attested to by the fact that all the obligations are stated in the first person ("I am the Lord") and addressed by God to another personal subject ("you"). In all God's commandments, the singular personal pronoun designates the recipient. God makes his will known to each person in particular, at the same time as he makes it known to the whole people.

I would go further and to say that the obligations are addressed not just in the first person but addressed to the *heart* of each personal subject. Everything in the Church is meant to touch the heart. That is how our relationship with God begins:

> The invitation to converse with God is addressed to [the human being] from the beginning of human existence. For if a human being exists it is because God has created him through love, and through love continues to be maintained in existence. The human being cannot live fully according to truth unless he freely acknowledges that love and unless he entrusts himself to his Creator (GS 19).

Canon law is part of what one might call the structural aspect of the Church. One of the most important priorities for the Church in a secularised world is strenuously to counter the tendency to see the structures of the Church as detached realities in their own right. That way we finish up by granting a freestanding reality to that most pernicious of abstractions, 'the institutional Church'. The 'institutional church' viewed as a thing in itself is like Ezekiel's valley of dry bones. I suspect that it is one of the primary sources of the drift away from the Church. Anything which is seen primarily as an institution is bound to lack a sense of welcome and a sense of community.

Pope John Paul II wrote very clearly about the structural element of the Church:

> In the context of the "great mystery" of Christ and of the Church, all are called to respond - as a bride - with the gift of their lives to the inexpressible gift of the love of Christ, who… is the Church's Bridegroom… Although the Church possesses a "hierarchical" structure, nevertheless *this structure is totally ordered to the holiness of Christ's members*.[14]

And, in a footnote, in which he quotes von Balthasar, he says that the Virgin Mary:

> …precedes all others, including obviously Peter himself and the Apostles… because their triple function [teaching, sanctifying and ruling] has *no other purpose* except to form the Church in line with the ideal of sanctity already programmed and prefigured in Mary."[15]

[14] POPE JOHN PAUL II, *Mulieris dignitatem,* 27 (my italics).

[15] Ibid., quoting Hans Urs von Balthasar (my italics).

4 — *In a Secularised Culture*

People tend to look at the structural element of the Church without any reference the Spirit who would bring the dry bones to life. Pope Benedict XVI spoke about people for whom the faith and the Church do not touch their hearts. He was pointing to a crucial pastoral challenge of our time. Generally speaking, institutions do not touch people's hearts, though people working within institutions often do. The alienation from institutions which is pervasive in our time has had an enormously negative effect on the Church, which in its essence is a *communion*, the direct opposite of alienation.

This has happened largely because the secularist world-view makes it very difficult to see faith as the central meaning of absolutely everything. At best, it is very important aspect of life, to which we pay attention from time to time while still keeping such "private" matters to ourselves. But a god who is simply an *aspect* of life, however important, is not the almighty Creator and sustainer of the universe. Our world tempts us to give up on the effort to see Christ as what the Vatican Council called him: "the joy of all hearts, and the fulfilment of all aspirations" (GS 45) and to see him at most as one item among the many claims on our time and attention. We are swamped by so many demands, interests, distractions, floods of information and so on that faith, almost inevitably, is pushed into taking its place in the queue.

The challenge of faith is to see that God belongs at the heart of our lives as the source of all that exists, to recognise that God is already the source, and the goal of everything we are and everything we do. This is the core of renewal in the Church—to be people who live by the great commandment of God—to love him with ALL our heart and soul and might, and to love our neighbours as Christ loves us.

Life in the Church has to be founded on a "spirituality of communion" with God and with one another. Without that, as Pope John Paul II warned, "external structures of communion will serve very little purpose. They would become mechanisms without a soul, 'masks' of communion rather than its means of expression and growth."[16]

That challenge faces every aspect of the Church's life. Nothing in the Church has any other ultimate purpose than to foster growth in union with Christ. In the end canon law is not just about smooth order, but about *communion with God and with one another*. The concept of "communion" is,

[16] Pope John Paul ii, *Novo millennio ineunte,* 43.

according to the Extraordinary Synod of Bishops called to mark the twentieth anniversary of the closure of Vatican II, "the central and fundamental idea of the Council's documents."[17]

It is vital that we do not allow ourselves to be swallowed by the compartmentalisation of secularist society—a slot for family, a slot for work, a slot for recreation, a slot for finance, a slot for God. But the point is that God cannot have a slot. God is omnipresent, and omnipotent. The first casualty of secularisation is the universal transcendent vision of an infinite Goodness and Truth which holds all things together. The Extraordinary Synod said:

> … the ecclesiology of communion cannot be reduced to purely organizational questions or to problems which simply relate to powers… the ecclesiology of communion is also *the foundation for order* in the Church, and especially for a correct relationship between unity and pluriformity in the Church.[18]

One cannot help thinking that that may very precisely express what Paul VI was reaching for in a *Lex fundamentalis*—the foundation for order in the Church and for a correct relationship between unity and pluriformity.

In every aspect of life, we need to focus more clearly on the nature and mission of the Church and to see every aspect of Church life in that context. As with everything in the life of the Church, the teaching, interpretation, implementation of canon law is meant to be at the service of the invitation spoken to each human heart at the beginning, made explicit as an invitation into the Body of Christ in Baptism, and continually present throughout our lives. It is undoubtedly and necessarily about order, preferably smooth order, but it is ultimately about something even more fundamental—the heartfelt response to the call which we receive as individuals but also in the *communio* of the Church. If canon law is about order in the life of God's People; it is founded on theology and ecclesiology. If it is to be at the service of the response of people's hearts to the love of God—there has to be a *spirituality* of Law. Indeed there would need to be a mysticism of law in the sense that Karl Rahner used that term. He said that the Christian of the future would either be a mystic or would not exist at all. By that he meant "not singular parapsychological phenomena, but a genuine experience of God emerging from the very heart of our existence".[19]

[17] EXTRAORDINARY SYNOD OF BISHOPS 1985, Final Report, II.C.I. Available at http://www.ewtn.com/ library/curia/synfinal.htm

[18] Ibid. (my italics)

[19] K., RAHNER, *Theological Investigations XX*, ch 11, Darton, Longman and Todd 1981, pp. 149, (my italics).

I would not dare to venture into the question as to how precisely the interpretation and application of specific laws in specific circumstances can reflect, be in harmony with, and advance the ecclesiology and the underlying truth of the law of God implicit in the New Covenant. It is, however a fundamental question. Canon law must not be separated from the ecclesiological and theological and spiritual realms either in individual canonists or in the canonical enterprise as a whole. I suspect that Pope Paul VI's proposal for a *Lex fundamentalis* was not simply prompted by a desire to harmonise the two-fold canon law, but by a recognition that the nature and mission of the Church in some sense functions like a Constitution in the light of which all Church life and law must be understood and interpreted.

Vatican II described the Church:

> the Church is in Christ like a sacrament or as a sign and instrument both of a very closely knit union with God and of the unity of the whole human race, it desires now to unfold more fully to the faithful of the Church and to the whole world its own inner nature and universal mission (LG 1).

It went on to speak of the Church as mystery, sacrament, People of God, Body of Christ, our Mother. Pope Benedict XVI said the Church as "a reality defined by acceptance of the Word of God who, by taking flesh, came to pitch his tent among us."[20] This is the reality which, however we try to formulate it, is the *Lex fundamentalis* of the Church. Our relationship to that founding Word of the New Covenant, who is Jesus Christ, is faith, a personal encounter.

I wonder whether what Pope Paul VI felt the need for was not a law in any juridical sense but some way of expressing the truth that the personal encounter of faith which is the foundation of everything in the Church must also be the foundation of canon law. Whether that hunch is right or not, canon law, and everything in the Church has to be at the service of growth of communion with God and one another.

Conclusion

It is only by understanding ourselves and understanding the Law in the light of that foundation that the apparent gap between the legal and the pastoral can be seen to be a false dichotomy. To say that the dichotomy is false is not just a truth to be rejoiced in but an imperative to be put into practice.

[20] POPE BENEDICT XVI, post-synodal apostolic exhortation on the Word of God, *Verbum Domini,* 50.

Canon law, to be true to itself, has to be based on an ecclesiological, and even more basically on a spiritual, indeed on mystical foundation. To put it simply: Either our obeying, implementing and teaching of canon law arise from our personal and communal response to the Word of God, to the *Torah* in the wide sense, or they miss the point. I end with the words of Pope Francis:

> Baptism that makes us children of God and the Eucharist that unites us to Christ must become life, that is, they must be expressed in attitudes, behaviour, gestures and decisions… However *everything passes through the human heart*: if I let myself be touched by the grace of the Risen Christ… I allow the victory of Christ to be affirmed in my life, to broaden its beneficial action. This is the power of grace! Without grace we can do nothing.[21]

[21] POPE FRANCIS, *Regina coeli*, Easter Monday, 1 April 2013 (my italics).

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POPE FRANCIS AND PARTICIPATIVE BODIES IN THE CHURCH: CANONICAL REFLECTIONS

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SUMMARY — In his apostolic exhortation *Evangelii gaudium*, Pope Francis invites all communities in the Church to be in a permanent state of mission and renewal. The sole reference to the Code of Canon Law in the apostolic exhortation identifies 26 canons which provide legislation for seven distinct "means of participation" in the particular Church. Pope Francis invites the faithful to assume the task of rethinking these seven participative bodies, in order to enliven them in their missionary purpose and to promote "an ecclesial renewal which cannot be deferred" (tit. n. 27). In response to this prophetic invitation of Pope Francis, this study (1) recalls anew the purpose of participative bodies in the Church; (2) considers the unique mission of each participative body in the particular Church; and (3) "rethinks" various aspects of these seven participative bodies, even with an eye to modifications for future *praxes*.

RÉSUMÉ — Dans son exhortation apostolique *Evangelii gaudium*, le pape François invite toutes les communautés dans l'Église à se maintenir dans un état permanent de mission et de renouveau. Le seul renvoi au Code de droit canonique que l'on trouve dans l'exhortation apostolique dégage 26 canons qui fournissent le fondement juridique de sept « moyens de participation » différents au sein de l'Église particulière. Le pape François invite les fidèles à assumer la tâche de repenser ces sept organismes participatifs, afin de les animer dans leur objectif missionnaire et de promouvoir « un renouveau ecclésial qu'on ne peut différer » (tit. n. 27). En réponse à cette invitation prophétique du pape François, la présente étude vise (1) à rappeler à nouveau les fins propres des organismes participatifs dans l'Église; (2) à considérer mission unique qui revient à chaque organisme participative dans l'Église particulière; et (3) à « repenser » divers aspects de ces sept organismes participatifs, en envisageant même de leur apporter des modifications en vue des pratiques de l'avenir.

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Introduction

The first chapter of Pope Francis's apostolic exhortation *Evangelii gaudium* is entitled: "The Church's Missionary Transformation" (nn. 19-49). In this chapter, the Pope invites the faithful to reflect upon "A Church Which Goes Forth" (part 1, nn. 20-24) and then discusses "Pastoral Activity and Conversion" (part 2, nn. 25-33). As he begins his reflections on this pastoral activity and conversion, Pope Francis explains that the apostolic exhortation expresses an ecclesial vision which has "programmatic significance and important consequences." He invites all communities to be in a permanent state of mission and to advance in a pastoral and personal conversion "which cannot leave things as they presently are."

> 25. I am aware that nowadays documents do not arouse the same interest as in the past and they are quickly forgotten. Nevertheless, I want to emphasize that what I am trying to express here has a programmatic significance and important consequences. I hope that all communities will devote the necessary effort to advancing along the path of a pastoral and missionary conversion which cannot leave things as they presently are. "Mere administration" can no longer be enough. Throughout the world, let us "permanently be in a state of mission."

And, he elaborates further that conversion will involve ecclesial structures:

> 26. ... There are ecclesial structures which can hamper efforts at evangelization, yet even good structures are only helpful when there is a life constantly driving, sustaining, and assessing them. Without new life and an authentic evangelical spirit, without the Church's "fidelity to her own calling," any new structure will soon prove to be ineffective.

Evangelii gaudium calls for a renewal of the Church which cannot be deferred. Among many other challenges, this renewal invites a rethinking the seven participative bodies in the particular Church referenced by Pope Francis in the apostolic exhortation: i.e., the diocesan synod, the presbyteral council, the college of consultors, the diocesan finance council, the diocesan pastoral council, the parish pastoral council, and the parish finance council. This study intends to offer reflections on these seven participative bodies. It considers their theological foundation, their unique purposes, their *modi operandi*. It concludes with recommendations intended to invigorate them in their essential ecclesial task of evangelization. They must be means, not obstacles, to the grace which flows through evangelization.[1]

[1] On 8 May 2014, in his daily Mass at Casa Santa Marta, Pope Francis spoke of evangelization and explains that ecclesiastical bureaucracy must not block grace. To the measure that participative bodies resemble bureaucratic structures, albeit necessary and useful ones, they

1 — *Renewal of the Church*

Pope Francis invites the faithful to "An Ecclesial Renewal Which Cannot Be Deferred" (nn. 27-33). He calls for a "renewal of structures" (1) which will make them more mission-oriented, (2) which will make ordinary pastoral activity more inclusive and open at every level, and (3) which will inspire in pastoral workers a constant desire to go forth and elicit a positive response to the summons to friendship extended to everyone by Jesus:

> 27. I dream of a "missionary option," that is, a missionary impulse capable of transforming everything, so that the Church's customs, ways of doing things, times and schedules, language and structures, can be suitably channelled for the evangelization of today's world rather than for her self-preservation. The renewal of structures demanded by pastoral conversion can only be understood in this light: as part of an effort to make them more mission-oriented, to make ordinary pastoral activity on every level more inclusive and open, to inspire in pastoral workers a constant desire to go forth and in this way to elicit a positive response from all those whom Jesus summons to friendship with him. As John Paul II once said to the Bishops of Oceania: "All renewal in the Church must have mission as its goal if it is not to fall prey to a kind of ecclesial introversion [post-synodal apostolic exhortation *Ecclesia in Oceania* (22 November 2001), n. 19]".

He invites everyone "to be bold and creative in this task of rethinking the goals, structures, style, and methods of evangelization in their respective communities:"

> 33. Pastoral ministry in a missionary key seeks to abandon the complacent attitude that says: "We have always done it this way." I invite everyone to be bold and creative in this task of rethinking the goals, structures, style and methods of evangelization in their respective communities. A proposal of goals without an adequate communal search for the means of achieving them will inevitably prove illusory. I encourage everyone to apply the guidelines found in this document generously and courageously, without inhibitions or fear. The important thing is to not walk alone, but to rely on each other as brothers and sisters, and especially under the leadership of the bishops, in a wise and realistic pastoral discernment.

must not become obstacles preventing people from receiving grace. The Pope said: "Let's think about these three moments of evangelization: the docility to evangelize: to do what God is requesting, secondly, a dialogue with the people—but during this dialogue, you begin from where these people come from—and thirdly, trusting in grace: Grace is more important than all the bureaucracy. 'What prevents this?' Remember this. So many times we people of the Church are a factory to create obstacles so people can't obtain grace. May the Lord help us to understand this." Available at: http://www.news.va/en/news/ pope-francis-the-church-should-bestow-the- grace-of

The reflective dialogue, which is "bold and creative in this task of rethinking the goals, structures, style and methods of evangelization," involves "a wise and realistic pastoral discernment" exchanged among brothers and sisters, and especially under the leadership of the bishops." In this, no one is walking alone (i.e., all are "synodal" = *syn* + *hodos* [Gk. *with* and *the way*], together on the road, journeying on the same path, etc).[2]

2 — *Rethinking Ministries and Structures*

The Pope invites the Church to rethink its ministries and structures. He says that "[s]ince I am called to put into practice what I ask of others, I too must think about a conversion of the papacy," citing Pope John Paul II who, in his encyclical letter *Ut unum sint* (25 May 1995), sought assistance in finding "a way of exercising the primacy which, while in no way renouncing what is essential to its mission, is nonetheless open to a new situation." Pope Francis adds: "We have made little progress in this regard" (n. 32). He also invites to ecclesial renewal the episcopal conferences (n. 32), the parish (n. 28), other church institutions, basic communities and small communities, movements, and forms of association (n. 29), and the particular Church (nn. 30-31).

Evangelii gaudium explains that each particular Church is called to missionary conversion, that each is the primary subject of evangelization. Therefore, the Pope encourages each particular Church to a resolute process of discernment, purification, reform:

> 30. Each particular Church, as a portion of the Catholic Church under the leadership of its bishop, is likewise called to missionary conversion. It is the primary subject of evangelization [cf. *Propositio* 41], since it is the concrete manifestation of the one Church in one specific place, and in it "the one, holy, catholic, and apostolic Church of Christ is truly present and operative" [VATICAN COUNCIL II, *Christus Dominus*, 11]. It is the Church incarnate in a certain place, equipped with all the means of salvation bestowed by Christ, but with local features. Its joy in communicating Jesus Christ is expressed both by a concern to preach him to areas in greater need and in constantly going forth to the outskirts of its own territory or towards new sociocultural settings [POPE BENEDICT XVI, Address for the fortieth anniversary of the decree *Ad gentes* (11 March 2006) in *AAS*, 98 (2006), p. 337].

[2] Pope Francis invites Catholics to learn from the Orthodox about their experience of synodality: "in the dialogue with our Orthodox brothers and sisters, we Catholics have the opportunity to learn more about the meaning of episcopal collegiality and synodality. Through an exchange of gifts, the Spirit can lead us ever more fully into truth and goodness" (n. 246).

> Wherever the need for the light and the life of the Risen Christ is greatest, it will want to be there [cf. *Propositio* 42]. To make this missionary impulse ever more focused, generous and fruitful, I encourage each particular Church to undertake a resolute process of discernment, purification and reform.

Moreover, the apostolic exhortation invites the pastors of the Church, in their mission of "fostering a dynamic, open and missionary communion," "to encourage and develop the means of participation proposed in the Code of Canon Law." The Holy Father writes:

> 31. The bishop must always foster this missionary communion in his diocesan Church, following the ideal of the first Christian communities, in which the believers were of one heart and one soul (cf. Acts 4: 32). To do so, he will sometimes go before his people, pointing the way and keeping their hope vibrant. At other times, he will simply be in their midst with his unassuming and merciful presence. At yet other times, he will have to walk after them, helping those who lag behind and—above all—allowing the flock to strike out on new paths. In his mission of fostering a dynamic, open and missionary communion, he will have to encourage and develop the means of participation proposed in the Code of Canon Law [cf. canons 460-468; 492-502; 511-514; 536-537], and other forms of pastoral dialogue, out of a desire to listen to everyone and not simply to those who would tell him what he would like to hear. Yet the principal aim of these participatory processes should not be ecclesiastical organization but rather the missionary aspiration of reaching everyone.

Pope Francis explains that the diocesan bishop will encourage and develop these canonical "means of participation" ("and other forms of pastoral dialogue") "out of a desire to listen to everyone and not simply to those who would tell him what he would like to hear." Indeed, these participative bodies are occasions for "pastoral dialogue" whose aim is "the missionary aspiration of reaching everyone."

This sole reference to the Code of Canon Law in the apostolic exhortation identifies 26 canons which provide legislation for seven distinct "means of participation" in the particular Church:

– the diocesan synod (cc. 460-468)	9
– the diocesan finance council (cc. 492-494)	3
– the presbyteral council (cc. 495-501)	7
– the college of consultors (c. 502)	1
– the diocesan pastoral council (cc. 511-514)	4
– the parish pastoral council (c. 536)	1
– the parish finance council (c. 537)	1
– **TOTAL**	**26**

Four of these participative bodies in the particular Church are mandated by universal law to exist at all times (i.e., the diocesan finance council, the presbyteral council, the college of consultors, the parish finance council); two can be mandated by the particular law of the diocesan bishop (i.e., the diocesan pastoral council and the parish pastoral council). One would be convoked occasionally by the diocesan bishop (i.e., the diocesan synod).

As mentioned above, everyone is invited "to be bold and creative in this task of rethinking the goals, structures, style, and methods of evangelization in their respective communities" and to do so "without inhibitions or fears" (n. 33). Within each particular Church, this task of creative rethinking is intended to foster a missionary communion which dynamic and open; this involves the development and encouragement of the seven participative bodies, whose principal aim is the missionary aspiration of reaching everyone (n. 31). Some ecclesial structures can hamper efforts at evangelization, "yet even good structures are only helpful when there is a life constantly driving, sustaining and assessing them. Without new life and an authentic evangelical spirit, without the Church's 'fidelity to her own calling,' any new structure will soon prove to be ineffective" (n. 26).

Theologians, canonists, and, above all, pastors are invited to accept the invitation of Pope Francis to assume the task of rethinking the participative bodies, in order to enliven them in their missionary purpose. They hear his challenge to be bold and creative in their reflections. Their informed and respectful study and exchanges further "an ecclesial renewal which cannot be deferred" (tit. n. 27).

Any and all reflective dialogue on ecclesial participative structures will involve three successive considerations: (1) To recall anew the purpose of participative bodies in the Church; (2) To consider the unique mission of each participative body in the particular Church; and (3) To "rethink" various aspects of these seven participative bodies in the life of the particular Church today, even perhaps with an eye to recommend modifications for future *praxes*.

3 — *The Theological Purpose of Participative Bodies*

Pope Francis explains: "Evangelization is the task of the Church. The Church, as the agent of evangelization, is more than an organic and hierarchical institution: she is first and foremost a people advancing on its pilgrim way toward God" (n. 111). Participative bodies are gatherings of

members of the Christian faithful who, bearing divine gifts and having various but complimentary ecclesial roles, collaborate together in the mission of the Church, which is evangelization. *Evangelii gaudium* presents succinctly an ecclesiology which invites everyone to assume a role in the evangelizing community:

> 24. The Church which "goes forth" is a community of missionary disciples who take the first step, who are involved and supportive, who bear fruit and rejoice. An evangelizing community knows that the Lord has taken the initiative, he has loved us first (cf. 1 Jn 4: 19), and therefore we can move forward, boldly take the initiative, go out to others, seek those who have fallen away, stand at the crossroads and welcome the outcast. Such a community has an endless desire to show mercy, the fruit of its own experience of the power of the Father's infinite mercy. Let us try a little harder to take the first step and to become involved. Jesus washed the feet of his disciples. The Lord gets involved and he involves his own, as he kneels to wash their feet. He tells his disciples: "You will be blessed if you do this" (Jn 13: 17). An evangelizing community gets involved by word and deed in people's daily lives; it bridges distances, it is willing to abase itself if necessary, and it embraces human life, touching the suffering flesh of Christ in others. Evangelizers thus take on the "smell of the sheep" and the sheep are willing to hear their voice. An evangelizing community is also supportive, standing by people at every step of the way, no matter how difficult or lengthy this may prove to be. It is familiar with patient expectation and apostolic endurance. Evangelization consists mostly of patience and disregard for constraints of time. Faithful to the Lord's gift, it also bears fruit. An evangelizing community is always concerned with fruit, because the Lord wants her to be fruitful. It cares for the grain and does not grow impatient at the weeds. The sower, when he sees weeds sprouting among the grain does not grumble or overreact. He or she finds a way to let the word take flesh in a particular situation and bear fruits of new life, however imperfect or incomplete these may appear. The disciple is ready to put his or her whole life on the line, even to accepting martyrdom, in bearing witness to Jesus Christ, yet the goal is not to make enemies but to see God's word accepted and its capacity for liberation and renewal revealed. Finally an evangelizing community is filled with joy; it knows how to rejoice always. It celebrates every small victory, every step forward in the work of evangelization. Evangelization with joy becomes beauty in the liturgy, as part of our daily concern to spread goodness. The Church evangelizes and is herself evangelized through the beauty of the liturgy, which is both a celebration of the task of evangelization and the source of her renewed self-giving.

Later, the apostolic exhortation says that the Church is composed of "missionary disciples." The new evangelization calls for the personal involvement,

the active engagement, of each missionary disciple. Pope Francis encourages everyone:

> 120. In virtue of their baptism, all the members of the People of God have become missionary disciples (cf. Mt 28: 19). All the baptized, whatever their position in the Church or their level of instruction in the faith, are agents of evangelization, and it would be insufficient to envisage a plan of evangelization to be carried out by professionals while the rest of the faithful would simply be passive recipients. The new evangelization calls for personal involvement on the part of each of the baptized. Every Christian is challenged, here and now, to be actively engaged in evangelization; indeed, anyone who has truly experienced God's saving love does not need much time or lengthy training to go out and proclaim that love. Every Christian is a missionary to the extent that he or she has encountered the love of God in Christ Jesus: we no longer say that we are "disciples" and "missionaries," but rather that we are always "missionary disciples." If we are not convinced, let us look at those first disciples, who, immediately after encountering the gaze of Jesus, went forth to proclaim him joyfully: "We have found the Messiah!" (Jn 1: 41). The Samaritan woman became a missionary immediately after speaking with Jesus and many Samaritans come to believe in him "because of the woman's testimony" (Jn 4: 39). So too, Saint Paul, after his encounter with Jesus Christ, "immediately proclaimed Jesus" (Acts 9: 20; cf. 22: 6-21). So what are we waiting for?

The fact that everyone shares the common vocation to be a missionary disciple in the work of evangelization does not mean that everyone has the same gifts or the same ecclesial function. There remains a complementary distinction between the faithful and those ordained for their service, between the common priesthood and those who, called from the common priesthood, share in the ministerial priesthood of Christ:[3]

> 104. It must be remembered that when we speak of sacramental power "we are in the realm of function, not that of dignity or holiness" [POPE JOHN PAUL II,

[3] Some ecclesial structures assign "equal membership" to clergy and laity without distinction, an example of which is the Council for the Economy established by POPE FRANCIS in his *motu proprio* establishing a new coordinating agency for the economic and administrative affairs of the Holy See and the Vatican City State *Fides et dispensator* (24 February 2014). Pope Francis describes the purpose of the Council: "1. The Council for the Economy is established as an entity having oversight for the administrative and financial structures and activities of the dicasteries of the Roman Curia, the institutions linked to the Holy See, and the Vatican City State." Available at: http://w2.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio_20140224_fidelis-dispensator-et-prudens.html.
Addressing its meeting on 2 May 2014, Pope Francis remarked: "The Council represents the universal Church: eight Cardinals of several particular Churches, seven laymen who represents different parts of the world and who contribute with their experience to the good of the

> post-synodal apostolic exhortation *Christifideles laici* (30 December 1988), n. 51]. The ministerial priesthood is one means employed by Jesus for the service of his people, yet our great dignity derives from baptism, which is accessible to all. The configuration of the priest to Christ the head—namely, as the principal source of grace—does not imply an exaltation which would set him above others. In the Church, functions "do not favour the superiority of some vis-à-vis the others" [CONGREGATION FOR THE DOCTRINE OF THE FAITH, declaration on the question of the admission of women to the ministerial priesthood *Inter insignores* (5 October 1976), in *AAS*, 68 (1977), p. 115, cited in POPE JOHN PAUL II, post-synodal apostolic exhortation *Christifideles laici* (30 December 1988), n. 190]. Indeed, a woman, Mary, is more important than the bishops. Even when the function of ministerial priesthood is considered "hierarchical," it must be remembered that "it is totally ordered to the holiness of Christ's members" [POPE JOHN PAUL II, apostolic letter *Mulieris dignitatem* (15 August 1988), n. 27]. Its key and axis is not power understood as domination, but the power to administer the sacrament of the Eucharist; this is the origin of its authority, which is always a service to God's people.

All the baptized are missionary disciples whose common vocation is evangelization. Each is empowered with unique gifts for the upbuilding of the Church. Pope Francis insists that personal charisms are at the service of a communion which evangelizes:

> 130. The Holy Spirit also enriches the entire evangelizing Church with different charisms. These gifts are meant to renew and build up the Church [cf. *Lumen gentium*, n. 12]. They are not an inheritance, safely secured and entrusted to a small group for safekeeping; rather they are gifts of the Spirit integrated into the body of the Church, drawn to the centre which is Christ and then channelled into an evangelizing impulse. A sure sign of the authenticity of a charism is its ecclesial character, its ability to be integrated harmoniously into the life of God's holy and faithful people for the good of

Church and to her particular mission. The laymen are full members of the new Council; they are not second class members, no! All are on the same plane." Zenit unofficial translation, available at: http://www.zenit.org/en/articles/pope-s-address-to-council-for-the-economy http://www.zenit.org/en/articles/pope-s-address-to-council-for-the-economy Original Italian text available at: http://press. vatican.va/content/salastampa/ it/bollettino/pubblico/2014/05/02/0316/00694.html

The Vatican Information Service on 3 May 2014 issued an informative note concerning the 2 May 2014 meeting of the council for the economy which reported: "As both the Holy Father and the Cardinal Coordinator [Reinhard Marx] were keen to emphasise in their discourses, the clerical and lay members of the Council are on the same level, with equal rights and responsibilities. This was made clear during the meeting itself by the fact that clergy and lay persons were seated in alternate positions at the table, rather than in two separate groups." Available at: http://press.vatican.va/content/ salastampa/it/bollettino/pubblico/2014/05/03/0318/00704.html#Traduzione in lingua inglese

> all. Something truly new brought about by the Spirit need not overshadow other gifts and spiritualities in making itself felt. To the extent that a charism is better directed to the heart of the Gospel, its exercise will be more ecclesial. It is in communion, even when this proves painful, that a charism is seen to be authentic and mysteriously fruitful. On the basis of her response to this challenge, the Church can be a model of peace in our world.

The common or fundamental Christian vocation is identified in the 1983 Code: "All the Christian faithful have the duty and right to work so that the divine message of salvation more and more reaches all people in every age and in every land" (c. 211). Moreover, they "are free to make known to the pastors of the Church their needs, especially spiritual ones, and their desires" (c. 212 § 2). Significantly, the law states:

> According to the knowledge, competence, and prestige which they possess, they have the right and even at times the duty to manifest to the sacred pastors their opinion on matters which pertain to the good of the Church and to make their opinion known to the rest of the Christian faithful, without prejudice to the integrity of faith and morals, with reverence toward their pastors, and attentive to common advantage and the dignity of persons (c. 212 § 3).

The service role of the clergy does not diminish the gifts and roles of the other faithful in the Church. Rather, their service involves their calling forth the gifts of all the faithful in the evangelization task of the Church, their respect for those gifts, and their assistance in the right ordering of the multiple, diverse, and complementary gifts of all the faithful for the common good. Indeed, the relation between the faithful and their pastors in promoting the common good is reflected in canon 223:

> § 1. In exercising their rights, the Christian faithful, both as individuals and gathered together in associations, must take into account the common good of the Church, the rights of others, and their own duties toward others.
>
> § 2. In view of the common good, ecclesiastical authority can direct the exercise of rights which are proper to the Christian faithful.

The participative bodies of the particular Church occasion the rich sharing of various gifts both at the level of the diocese and the level of the parish. Each must be a forum of open and respectful dialogue among the missionary disciples for the common good of the Church as it performs its essential task of evangelization. Each involves a trusting and open dialogue among the faithful and with their pastors. Arguably, any matter proper to the purpose of each participative body merits serious consideration for candid discussion.

The Code identifies the unique ecclesial purpose (*raison d'être*) of each participative body in the diocese and its parishes, to be discussed below.

The Code also distinguishes three *modi operandi* whereby a participative body acts in a manner which is consultative, consensual, or deliberative—that is, whereby it expresses to the competent ecclesiastical authority a "vote" which is (1) consultative, (2) consensual, or (3) deliberative. Canons precisely identify which kind of vote is given by a participative body in addressing a particular clearly identified matter.

– ***consultative vote*** (= advisory vote, counsel-giving vote, opinion). Sometimes, the law requires that a participative body offers its consultative vote to a superior. In such a case, the law requires that the body be convoked according to canon 166 (unless particular law or proper law provides otherwise) and that the counsel of all be sought (c. 127 §1). If the superior does not receive the counsel of the individuals in the required matter and acts nonetheless, the act of the superior is invalid. Obtaining the counsel enables the superior to act, but does not require the superior to do so. Moreover, the superior is not required to follow the counsel given. If the counsel received is unanimous, however, the superior should not act contrary to it without a reason which is overriding in the superior's judgment (see c. 127 § 2, 2°).[4]

[4] In reflecting on the relation of the diocesan bishop and the presbyteral council, the Directory for the Pastoral Ministry of Bishops *Apostolorum successores* discusses the response of the bishop to the consultative vote of the council: "182. ... After obtaining the opinion of the [presbyteral] council, the Bishop is free to make the decisions that he thinks are appropriate, evaluating and deciding the matter '*coram Domino*,' except when universal or particular law requires the consent of the council on certain questions [cf. *CIC*, c. 500 § 2]. However, the Bishop should not act contrary to the unanimous opinion of his councillors without a serious and overriding reason, which he must weigh carefully according to his prudent judgment."

The relation of the diocesan bishop and lay persons who collaborate with him and/or offer their expert advice to him is mentioned in the Directory: "160. The Personal Responsibility of the Bishop. The Bishop is called to encourage the lay faithful to participate in the life of the Church, making every effort to enlist their much-needed collaboration. He should also be prepared to consult experts and to listen to the various diocesan agencies, as the law requires, so as to confront those human, social and juridical problems that can present him with significant difficulties. In this way, the Bishop will acquire an overview of the situation and the needs of that portion of the People of God entrusted to him. Nevertheless, conscious of his role as Pastor and sign of unity in the particular Church, the Bishop avoids acting as a mere moderator between the various councils and other pastoral committees. Instead, he acts according to his personal rights and duties of governance that require him to decide independently according to conscience and truth, not simply according to the majority opinion of his counsellors, unless of course the law stipulates that he needs the consent of some college or group of persons before he may place a particular act [cf. *CIC*, c. 127 §§ 1-3; Pope John Paul II, post-synodal apostolic exhortation *Pastores gregis*,

– ***consensual vote*** (=consent-giving vote). Sometimes, the law requires that a participative body offers its consensual vote to a superior. In such a case, the law requires that the body be convoked according to canon 166 (and does not permit proper law or particular law to provide otherwise, as is possible with a consultative vote) and the consensual vote of an absolute majority of those present must be obtained (c. 127 § 1). If the superior does not seek the consent of the individuals, or if the superior acts contrary to the opinion of all or any of them, the superior's subsequent action is invalid. The superior is enabled by the consensual vote to perform the action, but is not required to do so.
– ***deliberative vote*** (= decision-making vote). Sometimes, the law assigns to a participative body the ability to elicit a deliberative vote, that is, to make a decision. This is a vote distinct from one which is consultative or consensual, both of which enable a superior to make a decision or to perform an action which otherwise the superior could not do validly. A body with a deliberative vote makes its own decision within the scope of its own competence. The Code makes explicit reference to a deliberative vote only in reference to certain actions of bishops gathered together,[5] but in fact a deliberative vote is sometimes given by participative bodies in a particular Church (e.g., the college of consultors when it elects a diocesan administrator and performs certain other specified tasks *sede vacante*).

The Code also requires those giving their (consultative or consensual) vote to do so "sincerely" and, if the grave matter requires it, to observe confidentiality;[6] indeed, the competent superior can insist on this confidentiality (c. 127 § 3).

n. 44]. The weight of responsibility to govern the diocese falls squarely on the shoulders of the Bishop."

Both these citations underscore the personal responsibility of the diocesan bishop in exercising his decision-making role *coram Domino*, but also demonstrate the importance of the consultative vote which others offer him. *Mutatis mutandis*, the same pertains in the relation between any competent superior and a participative body which is offering a consultative vote.

CONGREGATION FOR BISHOPS, Directory for the Pastoral Ministry of Bishops *Apostolorum successores* (22 Februarsy 2004), Vatican City, Libreria editrice vaticana, 2004.

[5] See canons 339 § 1 (on bishops in an ecumenical council); 343 (on bishops in a synod of bishops); 443-444 (on bishops in a particular council); 454, 455 § 2 (on diocesan and other bishops in the episcopal conference). See also canon 833, 1° on the profession of faith made by those who have a deliberative vote.

[6] Perhaps nowadays the Latin word *secretum* in canon 127 § 3 (and elsewhere in the law) would more prudently be translated as "confidentiality" rather than "secrecy."

4 — *The Unique Purpose and* Modus operandi *of Each Participative Body in the Particular Church*

Evangelii gaudium, n. 31, explains that the common purpose of every participative body is "pastoral dialogue" whose aim is "the missionary aspiration of reaching everyone." It also identifies seven distinct participative bodies within each particular Church (including its parishes). The purpose (*raison d'être*) of each body is unique. Moreover, the *modus operandi* of these bodies varies: in diverse circumstances, the distinct bodies may offer a vote that is consultative, consensual, or deliberative.

4.1 — The Unique Purpose of Each Participative Body

The Code does not require that all seven bodies must exist at all times within each particular Church. As mentioned already, four of the participative bodies are mandated by the universal law and must always exist (the diocesan finance council, the presbyteral council, the college of consultors, and the parish finance council); two can be mandated by the particular law of the diocesan bishop and then would need to exist (the diocesan pastoral council and the parish pastoral council); and the seventh participative body is optional and is convoked occasionally, that is, "when circumstances suggest it in the judgment of the diocesan bishop after he has heard the presbyteral council" (the diocesan synod).

Each of these seven participative bodies has a unique purpose (*raison d'être*) which is identified in the Code:

- ***diocesan synod***: "to offer assistance to the diocesan bishop for the good of the whole diocesan community according to the norm" of canons 461-468 (c. 460)
- ***diocesan finance council***: to perform the functions assigned to it in *Book V: The Temporal Goods of the Church*; to prepare an annual diocesan budget;[7] to examine the annual diocesan financial report (c. 493; see c. 494 § 4); to review the annual financial reports of public juridic persons subject to the diocesan bishop (c. 1287 § 1);[8] to offer its consultation for the appointment and removal during the term

[7] An annual budget is required for dioceses by canon 493. Annual budgets for other juridic persons is only *strongly recommended*, though particular law can require them (canon 1284 § 2).

[8] This means that the diocesan finance council must review the annual financial reports of parishes, since parishes are public juridic persons *a iure* (canon 515 § 3) which have not been exempted from the power of governance of the diocesan bishop.

of office of the diocesan finance officer (c. 494 §§ 1-2); to elect a temporary diocesan finance officer if the diocesan finance officer is elected the diocesan administrator *sede vacante* (canon 423 § 2)[9]

- ***presbyteral council***: "to be like a senate of the bishop ... which assists the bishop in the governance of the diocese according to the norm of law to promote as much as possible the pastoral good of the portion of the people of God entrusted to him" (c. 495 § 1); "the diocesan bishop is to hear it in affairs of greater importance" (c. 500 § 2)
- ***college of consultors***: performs "the functions determined by law" in specific matters concerning diocesan leadership and temporal goods (c. 502 § 1)
- ***diocesan pastoral council***: "investigates, considers, and proposes practical conclusions about those things which pertain to pastoral works in the diocese" (=diocesan pastoral planning) (c. 511)
- ***parish pastoral council***: "assists in fostering pastoral activity" in a parish (=parish pastoral planning) (c. 536 § 1)
- ***parish finance council***: "assists the pastor in the administration of the goods of the parish, without prejudice to the prescript of canon 532" according to the norms issued by the diocesan bishop

4.2 — The Modus operandi of Each Participative Body

As mentioned above, the *modus operandi* of these seven participative bodies varies, according to diverse circumstances. They may offer a vote that is consultative, consensual, or deliberative.

- ***diocesan synod***: "The only legislator in a diocesan synod is the diocesan bishop; the other members of the synod possess only a consultative vote (*voto tantummodo consultativo*)." (c. 466)
- ***diocesan finance council***: depending on the distinct subject matters, has a deliberative vote, a consensual vote, or a consultative vote
  - the Code assigns one deliberative vote to the diocesan finance council: to elect a temporary diocesan finance officer if the diocesan

[9] *Sede vacante*, the law forbids the "superior" of the diocese (i.e., the diocesan administrator) from being also the "administrator" of diocesan goods (i.e., the diocesan finance officer). These offices are "incompatible" (see canon 152).
The provision of canon 423 § 2 enabling the diocesan finance council (a group which may be comprised entirely of lay persons) to confer an ecclesiastical office (see canons 145-183) gives remarkable and exceptional deliberative vote to the council. As a rule, offices in a particular Church are freely conferred by the diocesan bishop (canon 157).

finance officer is elected the diocesan administrator *sede vacante* (c. 423 § 2)

- the Code requires the diocesan bishop to receive the consensual vote of the diocesan finance council in order to perform the following three acts validly:
  1. to place acts of extraordinary diocesan administration as defined by the conference of bishops (c. 1277; the college of consultors must also give its consensual vote)
  2. to give permission to alienate goods of public juridic persons subject to his authority, and to alienate diocesan goods, which belong to stable patrimony and whose value is beyond the minimum amount established by the conference of bishops (c. 1292 § 2; the college of consultors and "those concerned" must also give their consensual vote)
  3. to give permission to administrators to perform any contractual transaction which can worsen the patrimonial condition of a public juridic person subject to his authority, or to perform the transaction himself if it involves diocesan goods (c. 1295; the college of consultors and "those concerned" must also give their consensual vote: see c. 1292 § 2)
- the Code requires the diocesan bishop to receive the consultative vote of the diocesan finance council in order to perform the following seven acts validly:
  1. to appoint and to remove the diocesan finance officer (c. 494 §§ 2-3; the college of consultors must also give its consultative vote)[10]
  2. to impose a moderate diocesan tax, ordinary or extraordinary, upon public juridic persons subject to his authority (c. 1263; the presbyteral council must also give its consultative vote)
  3. to impose an extraordinary tax upon other juridic persons and upon physical persons subject to his authority (c. 1263; the presbyteral council must also give its consultative vote)

[10] The Eastern law makes the eparchial finance officer *ipso iure* a member of the eparchial finance council (CCEO, canon 263 § 2). The Latin code does not. Given that the finance council gives its consultative vote for the appointment and removal of the finance officer, and given that the finance officer must render an annual report of receipts and expenditures to the finance council, it seems preferable not to appoint the finance officer to the finance council upon which he depends for his appointment and continuation in office and to which he must submit an annual report of his function, lest there be even the appearance of impropriety.

4. to place "non-routine" acts of ordinary diocesan administration which are more important in light of the economic condition of the diocese (c. 1277; the college of consultors must also give its consultative vote)
5. to determine acts of extraordinary administration placed by public juridic persons subject to him (c. 1281 § 1)
6. to make a prudent judgment on the investment of money and movable goods assigned to an endowment for the benefit of a foundation (c. 1305)
7. to lessen equitably the obligations attached to a foundation (but not foundation Masses) if, through no fault of the administrators, the fulfillment of these obligations becomes impossible because of diminished revenue or some other cause (c. 1310 § 2; "those concerned" must also give their consultative vote)

– ***presbyteral council***: "The presbyteral council possesses only a consultative vote (*voto tantum consultativo*); the diocesan bishop is to hear it in affairs of greater importance but needs its consent only in cases expressly defined by law." (c. 500 § 2)[11]
  - the Code assigns a deliberative vote to the presbyteral council in one instance: the establishment of the body of "parish priest consultors" (c. 1742 § 2; see cc. 1745, 2°, 1750)
  - the Code requires the diocesan bishop to receive the consensual vote of the presbyteral council in order to perform the following seven acts validly:[12]
    1. to convoke a diocesan synod (c. 461 § 1)
    2. to establish, suppress, or notably alter parishes (c. 515 § 2)

[11] The Directory for the Pastoral Ministry of Bishops *Apostolorum successores* states: 182. ... "The Bishop *is to consult the council* on affairs of greater importance concerning the Christian life of the faithful and the governance of the diocese [cf. *CIC*, c. 500 § 2. Canon law establishes that the presbyteral council must be consulted on the following particular questions: cc. 461 (convocation of a diocesan synod), 515 § 2 (establishment, suppression and alteration of parishes), 1215 § 2 (building churches), 1222 § 2 (reduction of a church to secular use), 1263 (taxes), but the Bishop must also consult the presbyteral council in all other cases of major importance]."

[12] The majority of these situations involve ecclesiastical goods. The Directory for the Pastoral Ministry of Bishops *Apostolorum successores* says that the diocesan bishop should involve the presbyteral council in important financial decisions: "189 ... b). The Bishop should involve the diocesan clergy, through the presbyteral council, in the important financial decisions that he wishes to make, and he should seek their opinion in such matters. In certain cases, it may also be helpful to consult the diocesan pastoral council."

3. to allocate offerings made by the faithful for parochial services and to remunerate the clerics who perform them (c. 531; see c. 551)
4. to mandate a pastoral council in each parish (c. 536 § 1)
5. to erect a new church building (c. 1215 § 2)
6. to relegate a church to profane but not sordid use (c. 1222 § 2)
7. to impose a moderate diocesan tax, ordinary or extraordinary, upon public juridic persons subject to his authority (c. 1263; the diocesan finance council must also give its counsel)

- the Code identifies no instances when the diocesan bishop must receive the consensual vote of the presbyteral council

– ***college of consultors***: depending on the distinct subject matters, has a deliberative vote, a consensual vote, or a consultative vote
  - the Code identifies four instances when the college of consultors is must give its deliberative vote (all occur when the see is vacant or impeded):[13]
    1. to elect a diocesan administrator within eight days when the see becomes vacant (c. 421 § 1), and to witness his profession of faith (c. 833, 4°)
    2. to assume diocesan governance when the see is vacant before the election of the diocesan administrator, if there is no auxiliary bishop (c. 419)
    3. to select a priest to govern an impeded see, if there is no coadjutor bishop (or if he also is impeded) and if the diocesan bishop has not composed a secret document identifying priests, listed in order of preference, to govern the impeded see (c. 413 § 3)

[13] The Code assigns several other functions to the college of consultors: (1) to inform the Apostolic See of the death of the diocesan bishop, if there is no auxiliary bishop (canon 422); (2) to see the apostolic letter of appointment of the diocesan bishop, in the presence of the chancellor, when he takes canonical possession of the diocese (canon 382 § 2); (3) to see the apostolic letter of appointment of the coadjutor bishop, together with the diocesan bishop and in the presence of the chancellor, when he takes possession of his office (canon 404 § 1); (4) to see the apostolic letter of appointment of both the coadjutor bishop and the auxiliary bishop, in the presence of the chancellor, when they take possession of their office, if the diocesan bishop is completely impeded (canon 404 § 3).
In addition to these functions which belong to the college of consultors as a group, members of the college *as individuals* are to be heard by the pontifical legate whenever a diocesan bishop or a coadjutor bishop is to be appointed. (canon 377 § 3)

4. to fulfill the functions of the presbyteral council when the see is vacant (c. 501 § 2)

• the Code requires the diocesan administrator to receive the consensual vote of the college of consultors in order to perform the following three acts validly:

1. to grant excardination or incardination of clergy, after the see has been vacant for a year (c. 272)
2. to remove the chancellor and other notaries (c. 485)
3. to issue dimissorial letters (c. 1018 § 1, 2°)

• the Code requires the diocesan bishop to receive the consultative vote of the college of consultors in order to perform the following three acts validly (all involve temporal goods):

1. to appoint the diocesan finance officer (c. 494 § 1)
2. to remove the diocesan finance officer during his or her five year term (c. 494 § 2)
3. to place "non-routine" acts of administration of diocesan ecclesiastical goods which are more important in light of the economic condition of the diocese (c. 1277)

• the Code requires the diocesan bishop to receive the consensual vote of the college of consultors in order to perform the following three acts validly (all involve temporal goods):

1. to place acts of extraordinary administration as defined by the conference of bishops (c. 1277; the diocesan finance council must also give its consensual vote)
2. to give permission to alienate goods of public juridic persons subject to his authority, and to alienate diocesan goods, which belong to stable patrimony and whose value is beyond the minimum amount established by the conference of bishops (c. 1292 § 2; the diocesan finance council and "those concerned" must also give their consensual vote)
3. to give permission to administrators to perform any contractual transaction which can worsen the patrimonial condition of a public juridic person subject to his authority, or to perform the transaction himself if it involves diocesan goods (c. 1295; the diocesan finance council and "those concerned" must also give their consensual vote; see c. 1292 § 2)

– ***diocesan pastoral council***: "A pastoral council possesses only a consultative vote (*voto tantum consultativo*)." (c. 514 § 1)

– ***parish pastoral council***: "A pastoral council possesses only a consultative vote (*voto tantum consulativo*)...." (c. 536 § 2)

In light of the above analysis, it is immediately obvious that each of these seven participative bodies has a distinct purpose. This is logical: if two or more entities are exactly the same, they are not two but one! Moreover, in clearly specified matters, a participative body acts with votes which are consultative, consensual, or deliberative.

5 — *Bold and Creative Rethinking about the Participative Bodies in the Particular Church*

Pope Francis invites the faithful to "rethink" various aspects of seven participative bodies in the life of the particular Church. Today, nearly 50 years after the end of Vatican Council II and over 30 years since the promulgation of the Latin Code, such reflections are informed by years of experience. Any "rethinking" not only will affirm the good pastoral experiences of these participative bodies, but can also offer responsible suggestions for future *praxes* which invite greater participation for all in our common missionary aspiration to reach everyone.[14]

Evangelii gaudium notes that some customs may "no longer serve as means of communicating the Gospel" and we should "not be afraid to reexamine them." Further, some ecclesiastical rules or precepts may "no longer have the same usefulness for directing and shaping people's lives" as they did in the past.

> 43. In her ongoing discernment, the Church can also come to see that certain customs not directly connected to the heart of the Gospel, even some which have deep historical roots, are no longer properly understood and appreciated. Some of these customs may be beautiful, but they no longer serve as means of communicating the Gospel. We should not be afraid to re-examine them. At the same time, the Church has rules or precepts which may have been quite effective in their time, but no longer have the same usefulness for directing and shaping people's lives. Saint Thomas Aquinas pointed out that the precepts which Christ and the apostles gave to the

[14] Addressing solidarity with the poor and their inclusion in society, *Evangelii gaudium* warns that changing structures must generate new convictions and attitudes; otherwise they will be harmful or useless. *Mutatis mutandis*, the same warning would apply to changes in the Church, including changes in its participative bodies. The Pope writes: "Changing structures without generating new convictions and attitudes will only ensure that those same structures will become, sooner or later, corrupt, oppressive and ineffectual" (n. 189).

> people of God "are very few" [*S. Th.* I-II, q. 107, a. 4]. Citing Saint Augustine, he noted that the precepts subsequently enjoined by the Church should be insisted upon with moderation "so as not to burden the lives of the faithful" and make our religion a form of servitude, whereas "God's mercy has willed that we should be free" [*Ibid.*] This warning, issued many centuries ago, is most timely today. It ought to be one of the criteria to be taken into account in considering a reform of the Church and her preaching which would enable it to reach everyone.[15]

Any discernment about participative structures in the particular Church, any rethinking of their purposes and *modi operandi*, will be directed by this fearless and faith-filled spirit.

The following ***ten*** recommendations are proposed in response to the papal invitation to rethinking ecclesial structures. The majority of these recommendations can be implemented immediately: they focus on the full and proper application of the existing law (or options provided by the law). The recommendations identified nearer the end, however, involve broader discernment and provision by the competent Legislator before they can be implemented. These recommendations are offered the sincere invitation for further dialogue among pastors, theologians, canonists—which may lead to refinement, expansion, disagreement.

Recommendation 1: To Identify Clearly the Common Purpose of All Participative Bodies and the Distinct Purpose of Each

The common purpose of the participative bodies is pastoral dialogue whose aim is the missionary aspiration of reaching everyone. Each participative body, moreover, has a distinct purpose. This distinct purpose of each participative body must be clearly identified, and *praxis* must reflect that purpose. No two bodies have the same role, although all share a common missionary interest and coexist within the one missionary communion of the Church. If the distinct purpose of each body is not clearly identified, there is a tendency to consider all the bodies as if they are the same. This causes great confusion.

It could happen, for example, that all the existing participative bodies at the diocesan level would gather in one common assembly, as if they were

[15] *Evangelii gaudium*, n. 108, says that youth call the Church to new directions, and that we are to be aware of a nostalgia that clings to ineffective structures and customs: "Young people call us to renewed and expansive hope, for they represent new directions for humanity and open us to the future, lest we cling to a nostalgia for structures and customs which are no longer life-giving in today's world."

one body. Or, both the pastoral council and the finance council at the parish level would routinely meet together, as if they were one body. If such an assembly is truly the common convocation of distinct bodies as such (and not a diocesan or parochial celebration of some unique, occasional sort, such as a day of evangelization formation), the gathering may blur the proper role of each participative body. It would also compromise the distinct contribution of each and of all.

The common purpose of participative bodies and the distinct purpose of each should be explained regularly to its members and to the faithful of the particular Church.

Recommended is the *praxis* of identifying clearly the common purpose of participative bodies and the distinct purpose of each.

Recommendation 2:
To Assure That No Participative Body is "Subordinate" to Another

At the level of both the diocese and the parish, no participative body is positioned as subordinate to another. Nor is any participative body dependant on another for the exercise of its proper purpose.

It could happen, for example, that the parish finance council would be treated as subordinate to the parish pastoral council, or even considered as a "standing committee" of the parish pastoral council. This arrangement would be seriously flawed. Although there is much practical merit in mutual communication among these parish participative bodies, each of the two pastoral councils (each with its distinct parochial purpose) relates directly to the *parochus* alone.

Recommended is the *praxis* of not subordinating any participative body to another.

Recommendation 3:
To Make Collective Reference to the Participative Bodies as "Participative Bodies" (not as "Consultative Bodies")

Not all the participative bodies offer only a consultative vote. As elaborated above, sometimes a body offers a consensual vote or a deliberative vote.

It could happen, for example, that all the participative bodies would be listed together under the general heading of "consultative bodies" in diocesan or parish directories. Since one or another participative body may elicit a

consensual vote or a deliberative vote in some matters, such a collective reference would be inaccurate (unless, in fact, it is correct that all the participative bodies listed only offer a consultative vote).

When there is a need to make collective reference to them, it would be much more accurate, and reflective of the terminology chosen by Pope Francis, to identify the bodies collectively simply as "participative bodies" in the diocese or the parish.

Recommended is the *praxis* of making collective reference to participative bodies precisely as "participative bodies."

Recommendation 4: To Be Fully Transparent With Each Participative Body

If the participative bodies are to perform their function effectively (whether they offer a consultative, consensual, or deliberative vote), they will need to be provided fully with the information needed to elicit a vote which is responsible.

The Code requires that persons giving counsel or consent in matters of alienation "are not to offer advice or consent unless they have first been thoroughly informed both of the economic state of the juridic person whose goods are proposed for alienation and previous alienations" (c. 1292 § 4; see c. 1295).[16] *Mutatis mutandis*, the same transparent disclosure should be required whenever a participative body is expected to offer a vote of any kind.

Moreover, canon 127 § 3 says: "All whose consent or counsel is required are obliged to offer their opinion sincerely and, if the gravity of the affair requires it, to observe secrecy diligently; moreover, the superior can insist upon this obligation." If members of participative bodies must be sincere in their votes, the superior authority is obliged to make sure that they are able to do so. They are to be provided fully with the appropriate data so their votes are sincere, well formed, and properly informed.

Recommended is the *praxis* of being fully transparent in sharing the appropriate information with each participative body, so that it will offer an informed vote.

[16] *CCEO* canon 1038 § 1 reflects *CIC* canon 1292 § 4, but *CCEO* canon 1038 § 2 adds: "Counsel, consent or confirmation is considered not to have been given, unless, in seeing them, previous alienations are mentioned."

Recommendation 5:
To Be Radically Receptive to the Consultative Vote of a Participative Body

The Code very clearly identifies certain matters which require the consultative vote of a participative body in the particular Church. This counsel is required before a superior is able to place a juridic act validly. Evidently, these matters have significant importance.

The very fact that the law requires the counsel of others conveys that the Code presumes that the superior should not yet have determined the action the superior intends to take concerning the matter. In other words, the consultative vote is not intended to be a mere formality to be tolerated so that, once the vote is given, the superior can do whatever has already been decided—no matter what the consultative vote is.

A consultative vote is an important involvement of the participative body for the common good of the particular Church. It needs to be respected and esteemed, and the superior should not have determined a course of action in advance of receiving it. Instead, the superior should be radically open to hearing the advice offered, without preconceived conclusions.

Recommended is the *praxis* of a superior being radically receptive to the consultative vote of a participative body.

Recommendation 6:
To Form Lay Persons for More Effective Roles in Participative Bodies

Evangelii gaudium makes reference to canons which govern seven participative structures in the particular Church. The Code requires that clergy alone be members of the presbyteral council and the college of consultors, and provides that some clergy be members of the diocesan synod and of the diocesan pastoral council. Otherwise, lay persons are the members of the participative bodies in the particular Church. For them to perform their ecclesial function more effectively, their appropriate formation is required. Pope Francis says in the apostolic exhortation that lay formation is an "ecclesial challenge:"

> 102. Lay people are, put simply, the vast majority of the people of God. The minority—ordained ministers—are at their service. There has been a growing awareness of the identity and mission of the laity in the Church. We can count on many lay persons, although still not nearly enough, who have a deeply-rooted sense of community and great fidelity to the tasks of charity, catechesis and the celebration of the faith. At the same time, a clear awareness of this responsibility of the laity, grounded in their baptism and confirmation, does not appear in the same way in all places. In some cases,

> it is because lay persons have not been given the formation needed to take on important responsibilities. In others, it is because in their particular Churches room has not been made for them to speak and to act, due to an excessive clericalism which keeps them away from decision-making. Even if many are now involved in the lay ministries, this involvement is not reflected in a greater penetration of Christian values in the social, political and economic sectors. It often remains tied to tasks within the Church, without a real commitment to applying the Gospel to the transformation of society. The formation of the laity and the evangelization of professional and intellectual life represent a significant pastoral challenge.

In this same vein, the Holy Father calls for "still broader opportunities for a more incisive female presence in the Church." He invites pastors and theologians "to recognize more fully what this entails with regard to the role of women in decision-making in different areas of the Church's life." He writes:

> 103. The Church acknowledges the indispensable contribution which women make to society through the sensitivity, intuition and other distinctive skill sets which they, more than men, tend to possess. I think, for example, of the special concern which women show to others, which finds a particular, even if not exclusive, expression in motherhood. I readily acknowledge that many women share pastoral responsibilities with priests, helping to guide people, families and groups and offering new contributions to theological reflection. But we need to create still broader opportunities for a more incisive female presence in the Church. Because "the feminine genius is needed in all expressions in the life of society, the presence of women must also be guaranteed in the workplace" [PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, *Compendium of the Social Doctrine of the Church*, n. 295] and in the various other settings where important decisions are made, both in the Church and in social structures.
>
> 104. Demands that the legitimate rights of women be respected, based on the firm conviction that men and women are equal in dignity, present the Church with profound and challenging questions which cannot be lightly evaded. The reservation of the priesthood to males, as a sign of Christ the Spouse who gives himself in the Eucharist, is not a question open to discussion, but it can prove especially divisive if sacramental power is too closely identified with power in general. It must be remembered that when we speak of sacramental power "we are in the realm of function, not that of dignity or holiness" [POPE JOHN PAUL II, post-synodal apostolic exhortation *Christifideles laici* (30 December 1988), n. 51]. The ministerial priesthood is one means employed by Jesus for the service of his people, yet our great dignity derives from baptism, which is accessible to all. The configuration of the priest to Christ the head—namely, as the principal source of grace—does not imply an exaltation which would set him above others. In the Church, functions "do not favour the superiority of some vis-à-vis the

> others" [CONGREGATION FOR THE DOCTRINE OF THE FAITH, declaration on the question of the admission of women to the ministerial priesthood *Inter insignores* (5 October 1976), in *AAS*, 68 (1977), p. 115, cited in POPE JOHN PAUL II, post-synodal apostolic exhortation *Christifideles laici* (30 December 1988), n. 190]. Indeed, a woman, Mary, is more important than the bishops. Even when the function of ministerial priesthood is considered "hierarchical", it must be remembered that "it is totally ordered to the holiness of Christ's members" [POPE JOHN PAUL II, apostolic exhortation *Mulieris dignitatem* (15 August 1988), n. 27]. Its key and axis is not power understood as domination, but the power to administer the sacrament of the Eucharist; this is the origin of its authority, which is always a service to God's people. This presents a great challenge for pastors and theologians, who are in a position to recognize more fully what this entails with regard to the possible role of women in decision-making in different areas of the Church's life.

Recommended is the *praxis* of enriching and on-going formation of the laity and especially of women, in order that they be more effective in their membership in participative bodies.

Recommendation 7: To Mandate Diocesan and Parish Pastoral Councils in the Particular Church

Evangelii gaudium mentions seven participative bodies in the particular Church. While some of them are mandated universally by the law, the Code says that the diocesan pastoral council and the parish pastoral council are mandated only by the particular law promulgated by the diocesan bishop.

The Code permits the diocesan bishop to establish these two pastoral councils within the particular Church. He can establish the diocesan pastoral council when pastoral circumstances suggest it (c. 511), and he can require the establishment of parish pastoral councils after he has received the consultative vote of the presbyteral council (c. 536 § 1).

The pastoral council, whether at the diocesan or parish level, exists for the sake of pastoral planning. By design, the majority of the members of the pastoral councils are lay persons (cc. 512 § 1, 536). They are participative bodies which enable the faithful to make known their needs and desires (c. 212 § 2) in light of their knowledge, competencies, and prestige (c. 212 § 3; see c. 228 § 1).

Given the immensity and urgency of the evangelization task of the missionary disciples everywhere, and given the tremendous wisdom offered by the pastoral council in planning means for effective evangelization, one is

hard pressed to discover any reason *not* to establish pastoral councils in the diocese and its parishes. Indeed, when he spoke with the world's newly appointed bishops on 19 September 2013, Pope Francis said that it is impossible to imagine a diocesan bishop without a diocesan pastoral council.[17]

Pope Francis obviously expects that the diocesan bishop would freely establish a diocesan pastoral council. Arguably, having heard the presbyteral council, the diocesan bishop would also mandate parish pastoral councils. These enable the pastors to be thoroughly acquainted with the lives of the faithful.

Recommended is the *praxis* of the diocesan bishop mandating the establishment of diocesan and parish pastoral council. Moreover, perhaps the Legislator would mandate these bodies universally, in which case their required existence would be constitutive law (see c. 86).

Recommendation 8: To Eliminate the Adverb "Only" in Describing the **Modus operandi** *of a Participative Body*

Sometimes the Code says that a participative body has "only" (*tantum, tantummodo*) a consultative vote. This adverb adds nothing to explain the *modus operandi* of the participative body which is not already understood by the adjective "consultative" (*consultativum*). To say that a participative body has a "consultative vote" is sufficiently clear and properly accurate; further explanation is unnecessary.

The inclusion of the adverb "only" can be taken to imply a diminishment of the contribution of the participative body to the life of the Church.[18]

[17] The Holy Father remarked: "It is impossible to think of a bishop who did not have these diocesan institutions: a presbyteral council, consultors, a pastoral council, a council for financial matters. This means really being with the people. This pastoral presence will enable you to be thoroughly acquainted with the culture, customs and mores of the area, the wealth of holiness that is present there. Immerse yourselves in your own flock!" POPE FRANCIS, Address to a Group of Recently Appointed Bishops Taking Part in a Course Organized by the Congregation for Bishops and the Congregation for the Eastern Churches (19 September 2013). Available at: http://w2.vatican.va/content/francesco/en/speeches/2013/september/documents/papa-francesco_20130919_convegno-nuovi-vescovi.html

[18] Commenting on canon 475 of the 1980 *Schema* of the Code (which developed into canon 536 on the parish pastoral council), Archbishop Joseph Bernardin suggested that the word "only" (*tantum*) be eliminated from the text since it removes the weight of the pastoral council. The Secretariat replied that "only" will remain in the text in order to enforce and preserve the norm that the nature of this council is merely consultative because the *parochus* is the proper *pastor* of the parish entrusted to him. PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, *Relatio complectens synthesim animadversionum ab*

It conveys that its labors are "only" effective or useful after a superior authority judges them to be accurate or appropriate. It could be taken to imply that the participative body is not worthy of trust, and that a superior authority with more wisdom and gifts must check the accuracy, appropriateness, or relevance of its recommendations.

Recommended is the *praxis* of not referring to participative bodes as "only" consultative. Moreover, it is further recommended that the Legislator eliminate this unnecessary adverb in future legislation.

Recommendation 9: To Identify the Proper Use of the Available Modern Means of Social Communication and Interaction in the Functioning of Participative Bodies

Nowadays more and more means of social communication and interaction are available to more and more persons throughout the world: faxes, email, scans, the Internet, Skype, etc. These can be used effectively by the participative bodies as they perform their roles. Information in preparation for meetings of participative bodies can be disseminated readily through electronic means. Perhaps even occasional gatherings of a participative body (e.g., an urgently scheduled meeting) could employ the appropriate means of social communication and interaction for such an exceptional meeting.

The 1983 Code was promulgated before many of these means were common or even existing. Consequently, the Code does not provide indications on the acceptable use of social communication and interaction for various situations (e.g., elections, meetings, etc.) These means have developed and expanded greatly during the past three decades, and they are not going to disappear. They are effective means to evangelize and to do the work of the Church.

In this modern age, it would be most helpful if the Legislator provided direction and norms regarding the use of the available means of social communication in various dimensions of Church life, including also in the functions of participative bodies in the particular Church.

Recommended is the *praxis* of participative bodies using available means of social communication and interaction be developed and enhanced. Moreover, it is further recommended that the Legislator provide guidance concerning their acceptable use.

Em.mis atque Exc.mis Patribus commissonis ad novissimum schema Codicis Iuris Canonici exhibitarum, cum responsibus a secretaria et consultoribus datis, Vatican City State, Typis polyglottis Vaticanis, 1981, p. 128.

Recommendation 10:
To Consider Identifying More Instances When Each Participative Body Must Offer Its Votes, Including Deliberative Votes

The Code identifies several instances when participative bodies offer consultative votes, (less frequently) consensual votes, and (even less frequently) deliberative votes. Given a refreshed awareness of the gifts of all the people of God, bestowed by the Spirit for the common good of the Church in its task of evangelization, there would seem to be prudent wisdom in identifying even more such instances for all three kinds of votes.

With this in mind, perhaps refreshed reflection ought to be given *especially* to the identification of more matters requiring the deliberative vote of participative bodies. Presently, the Code identifies only a few instances when a given participative body has deliberative vote. The law could identify even more such specific matters which would demand the deliberative vote of a participative body.

At the level of the universal Church, the Code provides that the Pope can endow the synod of bishops with a deliberative vote, in which case he ratifies its decisions. Canon 343 states:

> It is for the synod of bishops to discuss the questions for consideration and express its wishes but not to resolve them or issue decrees about them unless in certain cases the Roman Pontiff has endowed it with deliberative power, in which case he ratifies the decisions of the synod.

Nothing prevents a similar arrangement involving other participative bodies, including those in the particular Church. Deliberative vote could be assigned in certain clearly and precisely identified matters to a participative body, whose decision would need to be ratified by the competent superior.

A recent application of extending deliberative vote in specific matters to a new participative body is contained in legislation concerning the "governing council" (*regiminis consilium*), which exists in the personal ordinariates established for former Anglicans (which are particular Churches). This legislation establishing the governing council is contained in Pope Benedict's apostolic constitution Anglicanorum *coetibus* (4 November 2009),[19] article X, and then elaborated in the Congregation for the Doctrine of the

[19] POPE BENEDICT XVI, apostolic constitution providing for personal ordinariates for Anglicans entering into full communion with the Catholic Church *Anglicanorum coetibus* (4 November 2009), in *AAS*, 101 (2009), pp. 985-990. English translation available at: http://www.vatican.va/holy_father/benedict_xvi/apost_constitutions/documents/hf_ben-xvi_apc_20091104_anglicanorum-coetibus_en.html.

Faith's *Complementary Norms* (4 November 2009),[20] article 12. The governing council is composed only of priests (at least six in number), and replaces the presbyteral council and the college of consultors. The *Complementary Norms* assign to the governing council specific matters requiring its consultative vote, consensual vote, and deliberative vote.[21]

The *Complementary Norms* identify five matters involving which the governing council has deliberative vote:

> Article 12 § 4. The governing council has a deliberative vote"
>
> a. when choosing a *terna* of names to submit to the Holy See for the appointment of the ordinary;
> b. when proposing changes to the complementary norms of the personal ordinariate to present to the Holy See;
> c. when formulating the statutes of the governing council, the statutes of the pastoral council, and the rule for houses of formation.

It is noteworthy that in each of these matters in which the governing council has deliberative vote, its decisions are always subject to implementation or approval by a higher authority:

- when the governing council decides on the *terna* of candidates to be the ordinary, the selection of the ordinary is made by the Roman Pontiff (*AC*, art. IV; *CN*, art. 4 § 1)
- when it decides on changes to be made in the complementary norms, the changes are made by the Holy See (*CN*, art. 12 § 4, a)
- when it decides on the statutes of the governing council, the statutes must be approved by the ordinary and confirmed by the Holy See (*AC*, art. X § 1; *CN*, art. 12 § 1)
- when it decides on the statutes of the pastoral council, the statutes must be approved by the ordinary (*CN*, art. 13 § 2)
- when it decides on the rule for houses of formation, the rule must be approved by the ordinary (*CN*, art. 10 § 3)

[20] CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Complementary Norms for the Apostolic Constitution* Anglicanorum coetibus (4 November 2009), in *L'Osservatore Romano* (9-10 November 2009), p. 7. English translation available at: *L'Osservatore Romano (English)* (11 November 2009), p. 4, and http://www.vatican.va/ roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20091104_norme-anglicanorum-coetibus_en.html

[21] The *Complementary Norms*, art. 12 §§ 1-3 identify matters concerning which the governing council offers a consultative vote and a consensual vote. It elicits a consensual vote: to admit a candidate to holy orders, to erect or suppress a personal parish, to erect or suppress a house of formation, to approve a program of formation, and to establish territorial deaneries (*CN*, art. 4 § 3). It elicits a consultative vote: on the pastoral activities of the personal ordinariate, and on the principles governing the formation of clergy.

When the governing council has deliberative vote, its decisions are operative only after involvement of a higher authority.

A similar kind of deliberative vote could be given, in certain clearly defined matters, to the currently existing participative bodies of the other particular Churches. Once the body has placed a deliberative vote, the superior authority would approve it (and perhaps even implement it after approving it).

Such an arrangement respects both the distinct gifts of everyone and the pastoral responsibility of the competent ecclesiastical superior authority to assure the common good and to maintain the theology and discipline of the Church. It reflects the complementary roles of the common priesthood and the ministerial priesthood (which exists for the sake of the common priesthood). Unlike the present arrangement (where participative bodies seldom have more than a consultative vote in advising the superior before the superior can perform a certain juridic act validly), this arrangement manifests the dignity and the gifts of baptized individuals who are able to render true "decisions," but at the same time respects the responsibility of the superior who would approve these decisions for the sake of the common good.[22]

[22] Or, perhaps one may even wish to establish an arrangement somewhat similar to the *recognitio* required from the Holy See for the acts of a particular council (c. 466), the statutes of an episcopal conference (c. 451), the general decrees of an episcopal conference (c. 455 § 2), et al. Once the *recognitio* is received, the author of the document promulgates it on its own authority. The Pontifical Council for Legislative Texts concludes its study of the *recognitio* thus:

> Since the *CIC* uses a guarded term (*vigilanti verbo usus est*), it cannot be affirmed *per se* that the *recognitio* is an approval or an authorization. Nor can it be said that it is a simple *nulla osta*.
> It can be considered as an act *sui generis* of the Holy See which aims to safeguard the formal and substantial juridical correctness of the acts subject to the *recognitio*, and the common action of the Church in those acts.
> In civil terms, it could be said that the promulgation of these normative documents is a "complex act" which foresees the *recognitio* as a *conditio sine qua non*.

PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, Explanatory Note on the Juridical Nature and Extension of the *Recognitio* of the Holy See (26 April 2006), in *Communicationes*, 38 (2006), pp. 10-17. [Author's translation.]

Mutatis mutandis in application to this current study, the participative body in the particular Church could be given deliberative vote in a clearly defined specific matter. Its work would then be subject to involvement of the higher authority (similar to the *recognitio*). This involvement would be conceived as a *conditio sine qua non* whereby the higher authority assures that the decision does not disturb the common good and is juridically and theologically correct. Once the higher authority has acted, the participative body would enact or implement its own decision.

When the superior receives the decision made by a participative body exercising its deliberative vote, should the superior be unable to accept that decision for the sake of the common good, the superior would give the reasons for not accepting it (see c. 127 § 2, 2°).[23] This explanation by the superior conveys a respect for the decision made by the participative body, likely involves sharing more information to the body, and invites future healthy, trusting, and truthful exchange between the faithful and their pastors.

Recommended is respectful dialogue among pastors, theologians, and canonists to discern even more matters concerning which a participative body would be expected to offer votes that are consultative, consensual, and even deliberative. Moreover, it is recommended that the conclusions of such dialogue be presented to the competent ecclesiastical authority so that the Legislator may discern possible modifications in the *praxis* of the Church concerning the *modus operandi* of its participative bodies.

Conclusion

The renewal of the Church cannot be deferred. Renewal occurs throughout the Church, the body of missionary disciples. One important aspect of renewal involves refreshed reflecting on the seven participative bodies in the particular Church, bodies whose aim must be the missionary aspiration of reaching everyone. These bodies occasion collaboration between the faithful and their pastors in the essential work of the Church: evangelization. Each body has its unique *raison d'être*. In clearly defined matters, these participative bodies elicit a consultative, consensual, or deliberative vote.

Pope Francis has invited a bold and energetic rethinking of these participative bodies so that they may be even more effective in the mission of evangelization. Perhaps this study is a simple response to his prophetic and apostolic invitation.

[23] The competent superior would recall the discipline of canon 51: "A decree is to be issued in writing, with the reasons at least summarily expressed if it is a decision."

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LES CIMETIÈRES CATHOLIQUES ROMAINS AU QUÉBEC

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RÉSUMÉ — Le Code de droit canonique énonce des règles concernant les cimetières, spécifiquement pour encadrer ce que l'Église considère comme un lieu sacré. Au civil, les États ont leurs propres motifs pour règlementer la propriété et l'administration des cimetières. Cet article se penche sur une législation civile particulière, celle du Québec avec son code civil et autres lois connexes. En droit civil québécois, les cimetières sont la propriété de personnes juridiques, lesquelles peuvent varier dans leur forme, leur mode de fonctionnement et dans leurs pouvoirs. L'auteur analyse chacune de ces institutions civiles en démontrant au passage l'harmonie de leur lien juridique avec le droit canonique. Il articule également quelques principes de gestion qui permettraient d'assurer une meilleure administration des cimetières, toujours en lien avec le contexte social et les lois civiles en vigueur.

SUMMARY — The Code of Canon Law provides rules for cemeteries in order specifically to oversee that which the Church considers as a sacred place. Civil states have their own reasons to regulate the ownership and management of cemeteries. This article focuses on the particular civil legislation in Quebec's Civil Code and other related laws. In Quebec civil law, cemeteries are the property of legal entities, which may vary in their form and mode of operation as well as their power. The author analyzes each of these civil institutions by studying the harmony of their legal relationship with the canon law. This article also proposes some principles to ensure a better management of cemeteries, always linked to the social context and the civil laws in place.

Introduction

Le mot cimetière, tiré du grec, signifie dormir. « Il a donc le même sens que le mot latin *dormitorium* et il évoque à la fois le dogme de l'immortalité

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de l'âme et le dogme de la résurrection des corps que les morts attendent dans le sommeil du tombeau »[1]. Dans l'esprit chrétien, le corps est déposé en terre, semé dans l'espérance en attente de la résurrection dans la gloire et l'incorruptibilité (voir 1 Co 15,42-44). Le cimetière catholique est un lieu symbolique de cette attente ; il est aussi le lieu réel où les fidèles sont ensevelis, procurant un espace sacré où les corps des défunts sont traités avec respect et charité, honorés comme enfants de Dieu et temples de l'Esprit Saint[2]. Si le cimetière est d'abord employé pour les morts, il profite aux vivants. Il offre un endroit de commémoration et de recueillement, favorisant le deuil chez les proches du défunt et rappelant aux fidèles que les morts ont toujours besoin de leurs prières.

La sépulture des morts n'est pas le propre des chrétiens. De tous les peuples, religions et cultures, il existe des rites entourant la mort manifestant souvent un schéma de croyances face à l'au-delà, mais démontrant certainement un respect pour nos semblables. Il n'est donc pas étonnant que non seulement le domaine religieux, mais aussi les pouvoirs civils se préoccupent de mettre en place des règles sur la disposition des cadavres. Pour comprendre le système légal actuellement en place au Québec, il faut connaître la relation particulièrement étroite qu'avait l'Église catholique avec le pouvoir civil et ce, dès le début de la colonie en Nouvelle-France. Les lois civiles québécoises concernant les cimetières et la sépulture des morts se sont donc développées en lien avec la tradition chrétienne du pays. De nos jours, l'état québécois est bel et bien séculier, et différentes lois continuent à s'ajouter pour répondre à de nouvelles réalités telles l'apparition de cimetières profanes. Mais il n'en demeure pas moins que les traces de la proximité de l'Église catholique d'avec l'État québécois sont encore présentes dans la législation civile.

Nous aborderons notre travail en examinant le droit de l'Église catholique à posséder des cimetières, du point de vue de la législation ecclésiastique d'abord, mais surtout du côté civil québécois. Différentes lois civiles permettent à différentes entités juridiques de posséder et d'administrer un cimetière ; nous en verrons les particularités et les avantages, tout en soulignant leurs concordances avec le droit de l'Église. La deuxième partie présentera quelques principes favorisant la bonne gestion des cimetières ainsi que quelques lois civiles qu'un administrateur de cimetière doit connaître. Nous terminerons en exposant les lois propres de l'Église catholique s'appliquant aux cimetières et aux sépultures.

[1] R. NAZ, art. « Cimetière », dans *Dictionnaire de droit canonique*, vol. 3, Paris, Letouzey et Ané, 1942, col. 729.

[2] Voir *CÉC*, n° 2300.

1 — *Les types de propriété des cimetières au Québec*

Le cimetière est un terrain destiné à servir à des fins de sépulture. Ce bien immeuble peut accueillir des constructions telles une chapelle, un mausolée ou un columbarium. « Un cimetière n'est pas en soi une entité juridique ; il relève plutôt de l'objet d'une personne morale constituée en vertu de lois publiques ou par une loi privée »[3]. C'est donc un bien qu'une personne morale peut posséder et administrer, mais dans les limites que les différentes législations (civiles et ecclésiastiques) imposent. Ce présent chapitre s'attardera à la propriété des cimetières au Québec, d'abord du point de vue de l'Église, puis de l'État québécois. Ensuite, nous verrons l'harmonie qui existe entre les deux systèmes légaux.

1.1 — Le droit de propriété de l'Église

Le droit de l'Église à posséder des biens temporels est inné[4]. Le canon 1255 énumère les sujets capables de posséder des biens : « L'Église tout entière et le Siège Apostolique, les Églises particulières ainsi que toute autre personne juridique publique ou privée, sont des sujets capables d'acquérir, de conserver, d'administrer et d'aliéner des biens temporels selon le droit ». De toutes ces entités juridiques, le canon 1241 nomme celles que l'on s'attend à voir posséder un cimetière : les paroisses et les instituts religieux[5]. Le Code de 1917 ordonnait que chaque paroisse ait son cimetière, à moins qu'un cimetière commun à plusieurs paroisses n'ait été régulièrement constitué par l'ordinaire du lieu[6]. « Maintenant [avec le canon 1241], rien n'est ordonné ni permis : on reconnaît simplement le droit de toute personne juridique ou de toute famille à avoir son propre cimetière ou son propre caveau, pourvu, bien entendu, que les lois civiles le permettent »[7].

[3] M. GOSSELIN, *L'environnement juridique des cimetières catholiques romains,* 4e édition révisée, Lévis, Jurinove, 2007, p. 1.1 (= GOSSELIN, *L'environnement juridique*).

[4] Voir *CIC*, c. 1254, texte français *Code de droit canonique, texte officiel et traduction française*, préparé par la SOCIÉTÉ INTERNATIONALE DE DROIT CANONIQUE ET DE LÉGISLATIONS RELIGIEUSES COMPARÉES, Paris, Centurion/ Cerf/Tardy, Ottawa, CECC, 1984. Cette traduction est utilisée pour les références subséquentes aux canons du *CIC*.

[5] Voir c. 1241. Il y est fait mention aussi « d'autres personnes juridiques » (on peut penser à un diocèse) et des familles. Notons que le canon ne parle pas de personnes physiques. Il semble que pour l'Église, le cimetière a une signification communautaire, donc une vocation publique, qui rappelle la communion des saints ainsi que le rassemblement au banquet céleste.

[6] Voir *CIC*/17, c. 1208, § 1.

[7] J. T. MARTÍN DE AGAR, Commentaire du c. 1241, dans *CDCA3*, p. 1077.

C'est justement cette harmonie du droit de l'Église et des lois civiles qu'il faut rechercher.

La possession et la gestion des cimetières est revenues traditionnellement aux différentes confessions religieuses, mais il y a bien longtemps que les pouvoirs civils se préoccupent de l'emplacement et du bon entretien des cimetières. L'hygiène public est le principal enjeu (mais parfois aussi l'esthétique), surtout concernant les champs de sépulture urbains. « En 1855, une loi empêche l'établissement de nouveaux cimetières à l'intérieur de l'agglomération [la ville de Québec] et prohibe toute inhumation dans ses limites »[8]. Bien que petit à petit, le pouvoir civil légifère en matière d'inhumation, « la "laïcisation" du cimetière au Québec n'aboutira pas comme en France à une solution radicale où le cimetière sera totalement pris en charge par le service municipal […] Au Québec, l'Église continuera de garder le cimetière sous sa tutelle. Sauf que son pouvoir devra cohabiter avec le pouvoir civil »[9]. Dans les deux prochaines sections, nous verrons de quelle manière le droit civil québécois permet à l'Église de posséder et gérer ses propres cimetières.

1.2 — La propriété en droit civil québécois

Puisque les cimetières sont la propriété de personnes morales, que leur régie et leur administration dépendent de la constitution de ces dites personnes morales, il importe de les définir et de les qualifier. Un survol de la législation du Québec permet de distinguer quatre catégories de figures juridiques pouvant posséder et exploiter un cimetière catholique romain. Ce sont les fabriques, les compagnies de cimetières catholiques romains, les compagnies

[8] L. GUAY, « Le cimetière vide », dans *Les cahiers du CRAD*, vol. 13, n° 1, 1991, p. 58. L'auteur cite aussi un document du conseil de ville de Québec concernant un cimetière : « […] Ce cimetière est devenu une grande nuisance au milieu d'une grande population, en ce que l'abondance des inhumations superposées a élevé la surface du cimetière en plusieurs endroits au-dessus du niveau de la localité avoisinante, exposant cette localité et les puits qui s'y trouvent à recevoir les égouts dudit cimetière » (Archives de la ville de Québec, Série conseil, Documents du conseil et comités, *Acte pour restreindre les inhumations dans le cimetière St. Matthew's*, 18 mai 1860).

[9] L. GUAY, « Le cimetière vide », p. 107. « Dans la plupart des pays en effet, en France notamment, l'Église n'est plus admise à posséder des cimetières. Le décret du 23 prairial an XII (12 juin 1804) et l'ordonnance du 6 décembre 1843 ont prescrit à toutes les communes d'établir chacune un cimetière ; la loi du 9 décembre 1905, art. 2 et 9, a transféré aux communes la propriété de tous les cimetières qui avaient appartenu jusque-là aux fabriques d'église » (R. NAZ, « Lieux et temps sacrés, culte divin, magistère, bénéfices ecclésiastiques, biens temporels de l'Église », dans R. NAZ (dir.), *Traité de droit canonique*, nouvelle édition, vol. 3, Paris, Letouzey et Ané, 1955, p. 44).

de cimetière créées en vertu d'une loi particulière, ainsi que les personnes morales possédant un cimetière à caractère privé telles les évêques et les instituts religieux. Chacune de ces entités sera définie dans les sections qui suivent et leurs particularités seront relevées.

1.2.1 — *La fabrique*

La fabrique est, au plan juridique, l'équivalent civil de la paroisse en droit canonique. « Une fabrique de paroisse ou de desserte est, par le seul fait de l'érection canonique de cette paroisse ou desserte, […] constituée en personne morale à compter de la date du dépôt de la copie certifiée du décret au registre prévu à l'article 2 »[10]. Elle a pour fin l'exercice de la religion catholique ; la loi sur les fabriques lui donne certains pouvoirs en ce sens. La fabrique peut entre autres « acquérir, établir, ériger, posséder, maintenir, administrer et gérer des églises, chapelles, presbytères, cimetières, columbariums, caveaux funéraires et autres constructions ; [et elle peut aussi] faire des règlements concernant : […] les conditions de concession des lots ou des fosses dans le cimetière qu'elle détient ; les conditions de concession des niches dans le columbarium qu'elle détient »[11]. C'est dans le cadre de la mission qu'elle poursuit que la fabrique peut posséder et administrer des cimetières et columbariums ainsi qu'établir des règlements qui les régissent. Comme nous le verrons plus loin, ses pouvoirs sont sensiblement plus restreints que ceux de la compagnie de cimetières et ils sont limités par le territoire.

Parmi les personnes morales pouvant posséder un cimetière, notons que la fabrique est qualifiée de droit public[12]. Cette distinction entre public et privé n'est pas sans conséquence :

> Si une corporation [personne morale] est publique, il en résulte certaines conséquences qui ne pourraient s'appliquer si elle était privée. Dans les corporations publiques, le Législateur protège l'intérêt des membres de ces corporations, de préférence à celui des tiers qui font affaires avec elles. Ainsi, toute personne traitant avec une corporation publique est censée connaître non seulement sa loi organique et ses documents constitutifs, mais encore les règlements édictés par cette corporation. Les membres d'une corporation publique ne peuvent déroger aux règles très strictes prescrites par

[10] *Loi sur les fabriques*, LRQ, chapitre F-1, art. 10. Le décret mentionné dans cet article de loi est celui de l'évêque, décret érigeant ou modifiant de façon quelconque une paroisse.

[11] Ibid., art. 18 (c) et 19 (e)-(f).

[12] Voir GOSSELIN, *L'environnement juridique*, p. 1.9-1.14. C'est ce que démontre Me Gosselin en s'appuyant sur la loi constitutive des fabriques et sur des énoncés de juges de la Cour Supérieur du Québec.

> les lois concernées, et s'ils le font ce défaut peut être invoqué contre toute réclamation d'un tiers contre la corporation. En un mot, pour les corporations publiques il faut observer toute la loi et tous les règlements et on ne peut plaider ignorance, renonciation ou ratification à l'encontre de tout manquement. Dans les corporations [personnes morales] privées, au contraire, le Législateur protège l'intérêt des tiers de préférence à celui des membres de la corporation. Ainsi […] les tiers ne sont pas tenus de connaître les règlements des compagnies, ils ne sont pas tenus de vérifier les faits de régie interne, et ils peuvent en toute sûreté s'en rapporter aux certificats des officiers de la corporation, que ces déclarations soient vraies ou non[13].

Les fabriques ont donc avantage à suivre à la lettre leur propre règlement de cimetière car celui-ci peut leur être opposé en cas d'erreur quant à son application. Outre la fabrique qui est de droit public, il peut y avoir des exceptions du côté de la compagnie de cimetière créée par loi particulière lorsque sa loi constitutive la définie de droit public[14].

La régie interne de la fabrique se fait par l'assemblée de fabrique, qui est composée d'un président d'assemblée, du curé (ou desservant) et de six marguilliers. Les marguilliers sont des paroissiens qui doivent être élus par l'assemblée des paroissiens. L'assemblée de fabrique, qui répond à la norme du canon 537, a un pouvoir décisionnel sur la gestion économique de la paroisse. Toutefois, ce pouvoir est soumis, dans bien des cas, à la surveillance et au contrôle de l'évêque du diocèse. Les articles 4, 5, 6, 19 et 26 de la loi sur les fabriques énoncent les pouvoirs de l'évêque en regard d'un cimetière paroissial. En voici quelques extraits :

> Art. 4 : L'évêque peut, dans son diocèse : *a)* arrêter l'emplacement […] des cimetières et des columbariums, en approuver les plans, les devis et le coût ; *c)* désaffecter un cimetière ou décréter que les corps n'y seront plus inhumés et que les cendres n'y seront plus déposées ; […]
>
> Art. 5 : L'évêque peut en outre pour son diocèse faire des règlements pour : *a)* assurer le maintien de la décence et du bon ordre dans les […] cimetières et columbariums catholiques romains ; *b)* déterminer les conditions d'admission aux funérailles catholiques romaines ; *b*.1*)* déterminer les conditions d'admission à l'inhumation dans les cimetières catholiques romains et les conditions d'admission au dépôt des cendres dans les cimetières ou les columbariums catholiques romains ; […]
>
> Art. 6 : L'évêque est le visiteur des fabriques de son diocèse. Il peut à ce titre les visiter et se rendre compte de tout ce qui concerne l'administration

[13] M. MARTEL et P. MARTEL, *La compagnie au Québec*, vol. 1, Montréal, Wilson & Lafleur/ Martel ltée, 1990, p. 40.

[14] E.g., *Acte pour incorporer la compagnie du cimetière de Montréal*, LQ 1847 (10-11 Victoria), chapitre 67.

> et la régie de leurs affaires ; il peut, mais sans préjudice des droits des tiers, les obliger à faire tout ce qu'il juge utile et nécessaire pour la régie, l'administration et le perfectionnement de leurs œuvres et à cesser de faire tout ce qu'il juge ne pas être approprié ou nécessaire à telles fins.
>
> Art. 19 : […] Ces règlements [ceux que la fabrique élabore pour son cimetière entre autre] entrent en vigueur sur approbation de l'évêque du diocèse de la paroisse ou de la desserte[15].

L'assemblée de fabrique doit conserver à l'esprit que « la fabrique est une personne morale mineure soumise à plusieurs égards à l'autorité de l'évêque de son diocèse »[16]. La gestion de la fabrique, y compris celle du cimetière paroissial, doit s'effectuer en harmonie avec cette autorité.

La fabrique a la possibilité de faire des règlements selon l'article 19 de la loi sur les fabriques. La portée et l'étendue de ces règlements sont limitées.

> Le pouvoir réglementaire de toute entité juridique habilitée par le législateur à édicter des règlements est subordonné à sa loi constitutive [ici la loi sur les fabriques] : le règlement doit porter sur un ou plusieurs objets spécifiquement énumérés à sa loi organique. Pour éviter de réglementer au-delà de ses pouvoirs (ultra vires) l'exploitant de cimetière catholique romain doit connaître les paramètres applicables à son action réglementaire […]
>
> En plus de devoir porter sur un objet expressément mentionné dans la loi habilitante, les règlements [des personnes morales] doivent être conformes aux fins pour lesquelles elles sont constituées[17].

Ainsi, le règlement de cimetière d'une fabrique ne peut porter que sur ce qui est énoncé à l'article 19, soit les conditions de concession des lots et des niches. Le règlement, pour avoir force de loi, doit être approuvé par l'évêque du diocèse. Peuvent aussi faire partie du règlement les objets mentionnés à l'article 5, alinéas a et b, sur décision de l'évêque. Si la fabrique réglemente au-delà de ses pouvoirs, les normes excessives (de même que les normes imprécises) sont invalides. Par ailleurs, le fait qu'elle soit une personne morale de droit public, son règlement est réputé connu de tous et s'impose aux paroissiens du simple fait de son existence.

La loi sur les fabriques permet l'aliénation d'un immeuble (tel un cimetière), mais sous l'approbation de l'évêque du diocèse. En outre, un cimetière paroissial peut être céder, gratuitement ou non, à une compagnie de cimetières catholiques romains dont la fabrique est membre[18]. « Toutefois, un terrain

[15] *Loi sur les fabriques*.

[16] GOSSELIN, *L'environnement juridique*, p. 1.33.

[17] Ibid., p. 1.64-1.65.

[18] Voir *Loi sur les compagnies de cimetières catholiques romains*, LRQ, chapitre C-40.1, art. 44.

ayant servi de cimetière ne peut être vendu ou aliéné à d'autres fins sans au préalable procéder à sa désaffectation ; [ce qui] signifie l'exhumation de tous les corps s'y trouvant pour les inhumer dans un autre cimetière […] »[19]. Un décret d'exécration devra être émis par l'ordinaire afin de retirer le caractère sacré au terrain du cimetière[20].

Toute paroisse est tenue de pourvoir un lieu d'inhumation à ses fidèles, selon le droit. Il peut arriver que dans des régions plus isolées, une paroisse n'ait plus les ressources suffisantes pour bien gérer son cimetière. La loi sur les compétences municipales permet aux municipalités locales d'administrer un cimetière[21]. Ce peut être une solution favorable dans certains cas particuliers. Soulignons cependant que dans cette éventualité, la fabrique demeure propriétaire de son cimetière et qu'elle en confie seulement la gestion. Il devient alors essentiel de rédiger un contrat de partenariat prévoyant un espace de réédition de compte.

1.2.2 — *La compagnie de cimetières catholiques romains*

La compagnie de cimetières catholiques romains[22] est une personne morale constituée en vertu de la loi sur les compagnies de cimetières catholiques romains, à la demande de deux ou plusieurs organismes paroissiaux (essentiellement des fabriques) qui en deviennent les membres. La requête doit être approuvée par l'évêque du lieu. « Les fins de la compagnie sont la détention et l'administration de cimetières catholiques romains »[23]. Cette entité juridique a été créée afin de permettre aux fabriques de se départir de leur cimetière paroissial et de se dégager de leur administration directe tout en gardant un droit de gestion à travers leurs délégués. Ainsi, plusieurs cimetières paroissiaux deviennent propriétés de la compagnie qui elle-même sera administrée, via des délégués, par l'ensemble de ses membres (qui sont les fabriques, anciennes propriétaires et utilisatrices de ces cimetières). Ce remaniement vise à favoriser une gestion harmonisée et plus efficace des cimetières catholiques romains.

Contrairement à la fabrique, la compagnie de cimetières est une personne morale de droit privé. On peut toutefois la qualifier comme étant d'intérêt

[19] GOSSELIN, *L'environnement juridique*, p. 1.85. L'auteur précise également que la désaffectation doit s'effectuer « conformément aux prescriptions de la loi sur les inhumations et les exhumations et des autres modalités que pourraient exiger le Ministre de la Santé et des Services sociaux, le Ministre de l'Environnement et la municipalité ou ville concernée » (ibid.).

[20] À défaut d'un tel décret, il y aurait des doutes quant à la validité de l'aliénation, même en droit civil (voir M. LÓPEZ ALARCÓN, Commentaire du c. 1294, dans *CDCA*, pp. 1135-1136).

[21] Voir *Loi sur les compétences municipales*, LRQ, chapitre C-47.1, art. 88.

[22] Nommé dorénavant la *compagnie de cimetières*.

[23] *Loi sur les compagnies de cimetières catholiques romains*, art. 22.

public[24]. C'est ce que démontrent entre autres son obligation, aux conditions établies par ses règlements, de donner l'inhumation aux défunts qui habitaient ou se trouvaient sur le territoire de l'un de ses membres (paroisses) et son pouvoir d'expropriation à des fins de cimetière[25].

La compagnie de cimetières est en tout premier lieu administrée par l'assemblée des délégués. C'est le principal droit des membres de la compagnie que de désigner des délégués pouvant les représenter à l'assemblée. Le curé est un délégué d'office, tandis que les autres sont nommés par l'assemblée de fabrique de la paroisse membre. De façon similaire à la fabrique, la compagnie de cimetières est soumise à un certain contrôle de l'évêque du lieu. La constitution même d'une telle compagnie doit être approuvée par écrit par l'évêque afin que le registraire des entreprises puisse procéder à sa création. En outre, l'évêque doit approuver l'organisation interne, l'admission et la démission des membres, la réglementation, l'acquisition et l'aliénation des immeubles, et tous autres pouvoirs spécifiquement énoncés à l'article 34 de sa loi constitutive.

Le pouvoir réglementaire de la compagnie de cimetières est celui octroyé par l'article 27. Il est plus étendu que celui d'une fabrique. En plus de pouvoir déterminer les conditions de concession de lots, la compagnie de cimetières peut réglementer les conditions de reprise de lots, la dévolution des lots concédés en cas de décès *ab intestat* du concessionnaire, l'admission à l'inhumation[26] et les ouvrages funéraires. Rappelons que chacun de ses règlements doit être approuvé par l'évêque du lieu. La compagnie de cimetières étant une entité de droit privé, ses règlements « ne s'appliquent qu'à ceux qui y ont consenti, de là l'importance de prévoir dans les contrats une clause par laquelle le cocontractant reconnaît avoir reçu copie des règlements applicables et qu'il accepte d'être lié par cette réglementation et ses éventuels amendements »[27].

Concernant l'aliénation, la compagnie de cimetières peut vendre ou céder ses immeubles, entreprises ou autres œuvres, mais toujours avec autorisation de l'évêque. Pour ce qui a trait au cimetière précisément, il semble y avoir une restriction malencontreuse de la loi. D'une part, selon l'article 46 de la loi sur les compagnies de cimetières catholiques romains, la compagnie de cimetières

[24] Voir GOSSELIN, *L'environnement juridique*, p. 1.14-1.15. La nuance du qualificatif « d'intérêt public » (contrairement à « de droit public ») ne semble pas apporter de statut particulier ni de privilège de par la loi.

[25] Voir *Loi sur les compagnies de cimetières catholiques romains*, art. 21 et 23 (n).

[26] Sur ce point, les cimetières de paroisses (fabriques) sont sous les règles édictées directement par l'évêque.

[27] GOSSELIN, *L'environnement juridique*, p. 1.67.

« est autorisée à céder *la totalité* de ses biens avec obligation de payer son passif à une compagnie constituée sous le régime de la présente loi » [mise en relief ajoutée]. Suite à une telle cession, la compagnie cédante pourra être déclarée dissoute. D'autre part, si la compagnie de cimetières ne voulait aliéner qu'un seul de ses cimetières, l'article 39 s'applique : « La compagnie ne peut aliéner un immeuble ayant servi comme cimetière avant d'avoir obtenu les autorisations requises pour en exhumer les corps et de les avoir placés dans un autre cimetière ». Selon cet article, il est impossible à une compagnie de cimetières, sans d'abord le désaffecter, de vendre ou de céder un de ses cimetières à une autre compagnie de cimetières catholiques romains ou même à une fabrique qui voudrait reprendre la pleine gestion de son ancien cimetière. Aussi, nous proposons un amendement à la loi pour la rendre un peu plus souple afin de répondre aux différentes éventualités. Voici un amendement souhaitable à l'article 39 de la loi sur les compagnies de cimetières catholiques romains : Les conditions d'aliénation prévues dans le présent article ne concernent que les cimetières qui seront destinés à une autre fin.

1.2.3 — *La compagnie de cimetière créée par une loi particulière*

Il peut arriver que dans une situation spécifique, ni la loi sur les fabriques ni la loi sur les compagnies de cimetières catholiques romains ne soit adaptée pour répondre aux besoins de gestion d'un cimetière en particulier. Le gouvernement provincial peut alors adopter une loi particulière constituant une compagnie qui pourra acquérir, posséder et administrer ce dit cimetière de façon adéquate en vertu des dispositions de cette loi. Bien que l'on puisse penser qu'une telle loi est nécessairement privée, ce n'est pas toujours le cas. Cette qualification de publique ou de privée dépend principalement de la loi constitutive elle-même[28].

Pour ce qui est de la régie interne, du pouvoir de surveillance de l'évêque et du pouvoir réglementaire d'une compagnie formée par une loi particulière, il est difficile de poser des règles communes car il faut regarder ce que chacune de ces lois prescrit. Il semble que, dans bien des cas, ces compagnies particulières soient également soumises à la loi sur les compagnies de cimetières catholiques romains, à la différence que leur loi constitutive particulière leur accorde une fin, des pouvoirs, droits et privilèges particuliers[29]. « Soulignons toutefois que pour obtenir leur constitution en compagnie,

[28] Voir ibid., p. 1.11-1.12.

[29] Voir Projet de loi n° 210 (privé), Loi sur la Compagnie de cimetières catholiques des Bois-Francs, 17 décembre 2004, dans *Gazette officielle du Québec*, partie II, 26 janvier 2005, 137e année, n° 4, art. 11, p. 531 ; voir aussi Projet de loi n° 200 (privé), Loi concernant la

l'approbation de l'évêque est requise ; ce qui implique un pouvoir de surveillance et de contrôle de l'évêque. Enfin, leur nature de cimetière catholique romain à caractère public démontre leur obédience à l'Église catholique romaine et les soumet ainsi au droit canonique, comme pour tout cimetière catholique romain à caractère public »[30].

1.2.4 — *Les cimetières à caractère privé*

Les trois types de propriété de cimetières catholiques romains vus précédemment, soit la fabrique, la compagnie de cimetières et la compagnie particulière, sont tous des organismes à caractère public. En ce sens, ils sont tenus, selon les normes du droit, de donner la sépulture à tous les fidèles habitant le territoire des paroisses qu'ils représentent ou se trouvant sur ce territoire lors du décès. Il s'établit donc des contrats de concession entre l'exploitant de cimetière et les concessionnaires (utilisateur du service). Ces notions de contrat ou d'obligation face au public ne sont pas présentes dans l'entourage des cimetières à caractère privé. Ces cimetières privés sont détenus par les instituts religieux ou par les évêques. Ces personnes morales sont autorisées respectivement par la *loi sur les corporations religieuses*[31] et par la *loi sur les évêques catholiques romains*[32] à posséder et gérer des cimetières pour les fins qui leur sont propres. Par exemple, le cimetière d'un institut religieux accueillera seulement ses membres et peut-être des membres affiliés ou des bienfaiteurs selon les règles internes que l'institut a données à ce cimetière ; et s'il accueille d'autres personnes, ce sera au jugement discrétionnaire du supérieur compétent et au cas par cas. Les cimetières à caractère privé sont évidemment soumis à la loi sur les inhumations et les exhumations. Notons finalement que la législation québécoise ne semble pas permettre à une personne physique de posséder un cimetière[33].

1.3 — La reconnaissance civile de principes ecclésiastiques

L'Église catholique est une société régie par tout un système canonique afin d'organiser sa partie visible en ce monde. Mais pour s'épanouir

Corporation du cimetière Mont-Marie, 21 juin 2003, dans *Gazette officielle du Québec*, partie II, 9 juillet 2003, 135e année, n° 28, art. 4, p. 3158.

30 GOSSELIN, *L'environnement juridique*, p. 1.38.

31 *Loi sur les corporations religieuses*, LRQ, chapitre C-71.

32 *Loi sur les évêques catholiques romains*, LRQ, chapitre E-17.

33 Voir GOSSELIN, *L'environnement juridique*, p. 1.4. La personne de l'évêque est constituée en personne morale selon l'article 3 de la loi sur les évêques catholiques romains.

pacifiquement dans ce système juridique, encore faut-il que les États civils reconnaissent sa juridiction et son autorité, au moins dans ses domaines que sont la pratique du culte et son organisation interne. Si certains prêchent la séparation stricte de l'Église et de l'État, refusant toute prise en considération du droit canonique en droit civil, d'autres souhaitent une cohabitation harmonieuse des deux systèmes légaux, voyant même d'un bon œil que le droit canonique soit appliqué directement devant le juge civil. « Mais il existe une approche plus pragmatique et finalement souvent plus juste. Elle consiste à ce que le juge civil tienne compte de la loi canonique comme d'un simple fait […] L'on aboutit ainsi non, au sens strict, à une " civilisation " du droit canonique, mais à une prise en considération modérée de ce droit par le juge civil »[34]. Toutefois, dans ses lois encadrant les cimetières, l'État québécois a bel et bien importé des règles du droit canonique, si bien que l'ont peut parler de *Civilizatio*. Ce terme est à comprendre à l'inverse de la notion de *canonisation* de lois civiles (exprimée au c. 22 du *CIC*), la *civilizatio* peut signifier « l'intégration dans la législation québécoise de dispositions du droit canonique »[35]. Nous verrons comment tant le respect du cimetière comme lieu sacré, la liberté de l'Église pour accorder (ou refuser) la sépulture ecclésiastique, que l'autorité de l'évêque dans son diocèse sont tous des points bien intégrés au cœur des lois du Québec.

1.3.1 — *Respect des lieux sacrés*

Pour l'Église, le cimetière est un lieu sacré de par sa destination et la bénédiction qu'il reçoit (voir c. 1205). Il est de ce fait inaliénable (à moins que sa destination ne change et qu'il ne perde sa bénédiction). Dans le Code civil du Québec en vigueur depuis 1994, la notion de choses sacrées n'est plus directement mentionnée. Il est toutefois stipulé : « Ce qui est hors commerce, incessible ou non susceptible d'appropriation, par nature ou par affectation, est imprescriptible »[36]. Si aucune liste n'est ici donnée, nous pouvons vérifier ce que l'ancien Code civil édictait : « Les cimetières,

[34] A. SÉRIAUX, *Droit canonique*, Collection droit fondamental, Paris, Presses universitaires de France, 1996, p. 680.

[35] E. CAPARROS, « Droit civil, *common law* et droit canonique au carrefour du droit québécois : la "*civilizatio*" du droit canonique », dans *La norma en el derecho canónico : Actas del III congresso internacional de derecho canónico, Pamplona, 10-15 de octubre de 1976, tome II*, Pamplona, Ediciones Universidad de Navarra, 1979, p. 737. Dans cet article, l'auteur retrace, avec une approche quelque peu historique, les mouvements de la *civilizatio* du droit canonique dans le Code civil du Québec.

[36] *Code civil du Québec*, Lois du Québec 1991, art. 2876 (= *CcQ*).

considérés comme chose sacrée, ne peuvent être changés de destination de manière à donner lieu à la prescription, qu'après l'exhumation des restes des morts, choses sacrées de leur nature »[37]. Notons qu'en droit civil québécois, un juge ne peut référer directement à un ancien article de loi abrogé ; c'est plutôt la jurisprudence qui permet, en tout premier lieu, de combler les vides juridiques. Aussi, certains expriment l'opinion que « si la disposition relative aux choses sacrées n'a pas été maintenue, nous estimons que la jurisprudence y relative continuera de s'appliquer »[38]. Nous pouvons prudemment présumer que le cimetière est une chose sacrée en droit civil et qu'il est inaliénable à moins d'un changement de destination.

Étant un lieu sacré, le cimetière mérite d'être traité comme il se doit. Le *CIC* stipule : « Ne sera admis dans un lieu sacré que ce qui sert ou favorise le culte, la piété ou la religion, et y sera défendu tout ce qui ne convient pas à la sainteté du lieu » (voir c. 1210). Aussi le canon 1243 ajoute : « Des règles opportunes seront établies par le droit particulier au sujet de la discipline dans les cimetières, surtout en ce qui a trait au maintien et à la protection de leur caractère sacré ». Le droit canonique laisse la discipline des cimetières au jugement de l'ordinaire et au droit particulier. Les lois québécoises entérinent la norme de ces canons. « L'évêque peut en outre pour son diocèse faire des règlements pour assurer le maintien de la décence et du bon ordre dans les églises, chapelles, lieux de culte, cimetières et columbariums catholiques romains »[39]. Pour compléter cette règle, la loi permet et aux fabriques et aux compagnies de cimetières de faire des règlements concernant le contrôle de leurs biens et œuvres[40].

1.3.2 — *Liberté de refuser la sépulture ecclésiastique*

La sépulture est en lien avec le rite des funérailles. C'est par ce rite que l'Église « procure aux défunts le secours spirituel et honore leurs corps en même temps qu'elle apporte aux vivants le réconfort de l'espérance » (voir c. 1176, § 2). Les funérailles ecclésiastiques font partie des sacramentaux et il appartient au Siège Apostolique seul de les constituer, donc d'en édicter

[37] *Code civil du Bas-Canada*, Statuts de la Province du Canada 1865, chapitre 41, art. 2217. Cet article fut établi et mis en vigueur lors de la première version de ce code, soit en 1866.

[38] D.-C. LAMONTAGNE, *Biens et propriété,* 5e édition revue et augmentée, Cowansville, Éditions Yvon Blais, 2005, p. 21.

[39] *Loi sur les fabriques*, art. 5 (a).

[40] Voir ibid., art. 19 (c) ; voir aussi *Loi sur les compagnies de cimetières catholiques romains*, art. 26 (f).

leurs règles d'usages. À travers le canon 1184, le Siège Apostolique joue son rôle en établissant la discipline à suivre concernant l'accès aux funérailles ecclésiastiques. Par corolaire, nous pouvons nous servir de ce canon pour déterminer qui peut se voir refuser la sépulture ecclésiastique.

À ce sujet encore une fois, la loi au Québec est bien claire :

> Il appartient à l'autorité catholique romaine seule de désigner dans le cimetière la place où chaque personne de cette croyance doit être inhumée ; et, si cette personne ne peut être inhumée d'après les règles et les lois canoniques, selon les jugements de l'ordinaire, dans la terre consacrée par les prières liturgiques de cette religion, elle reçoit la sépulture dans un terrain réservé à cette fin et attenant au cimetière[41].

Toutefois, puisque cet article de loi remonte au 19e siècle, il ne prend pas en considération toutes les conséquences de l'incinération (aujourd'hui très populaire en Amérique du nord). Selon les pratiques catholiques, les cendres des défunts sont placées dans des urnes cinéraires, lesquelles peuvent être soit enterrées dans des lots au cimetière, soit mises en niches dans un columbarium (ou à même un monument funéraire). L'inhumation, qui est littéralement la mise en terre, ne comprend donc pas la mise en niche de l'urne cinéraire. Au sens strict, l'article 5 de la loi sur les inhumations et les exhumations ci-haut cité ne donne pas pouvoir à l'autorité ecclésiastique de désigner, par sa seule prérogative, la place de la mise en niche des cendres à l'intérieur de ses cimetières. La loi sur les fabriques vient compléter cette lacune. Elle énonce : « L'évêque peut en outre pour son diocèse faire des règlements pour […] déterminer […] les conditions d'admission au dépôt des cendres dans les cimetières ou les columbariums catholiques romains »[42]. Il importe alors qu'il y ait un règlement promulgué car, sans normes préétablies, un juge civil ne pourrait probablement pas donner raison à un évêque qui voudrait empêcher de placer l'urne cinéraire d'un défunt à

[41] *Loi sur les inhumations et les exhumations*, LRQ, chapitre I-11, art. 5. Ce présent article reprend pratiquement mot à mot l'article 1 de l'*Acte concernant l'inhumation dans les cimetières des catholiques romains*, LQ 1875 (39 Victoria), chapitre 19, promulgué en 1875 suite à l'affaire Guibord. À l'époque, cette loi expresse voulait rétablir une décision jurisprudentielle qui se serait imposée comme règle d'interprétation dans les tribunaux. La plus haute cour d'appel du pays avait en effet obligé la fabrique Notre-Dame de Montréal à donner la sépulture, dans la partie bénie du cimetière, à un défunt (Joseph Guibord) excommunié pour appartenance à une société visée par la censure ecclésiastique, mais dont l'excommunication n'avait pas été décrétée nommément. Face à cette décision, « le législateur a cru devoir intervenir et reconnaître à l'évêque, en matière de sépulture chrétienne, toute l'autorité et tous les prérogatives que lui confère le droit canon » (P. B. MIGNAULT, *Le droit paroissial*, Montréal, Beauchemin & fils, 1893, p. 537). Pour un résumé d'ensemble de l'affaire Guibord, (voir ibid., pp. 537-541 ; voir aussi R. RUMILLY, *Histoire de Montréal*, Tome III, Montréal, Fides, 1972, pp. 18-19).

[42] *Loi sur les fabriques*, art. 5 (b.1).

qui on aurait refusé les funérailles ecclésiastiques, dans une niche réservée par contrat par ce défunt. En d'autres mots, dans le cas d'une personne ayant conclu un arrangement préalable avec une fabrique en se réservant une niche dans un columbarium pour accueillir ses cendres, et que cette personne, à son décès, se voyait refuser les funérailles ecclésiastiques, elle pourrait tenter de faire respecter ses droits, par le biais de ses successibles, en obligeant la fabrique à honorer le contrat de sépulture. À moins qu'il n'y ait, dans le contrat ou du moins dans le règlement de cimetière, une disposition donnant à l'autorité ecclésiastique une liberté souveraine quant aux conditions d'admission à ce genre de sépulture, une cour civile pourrait trancher en faveur du droit contractuel.

D'autre part, regardons ce que dit la loi sur les compagnies de cimetières catholiques romains. D'abord l'article 21 stipule : « Toute compagnie est tenue, si requise, de donner, aux conditions établies par ses règlements, l'inhumation aux défunts qui habitaient le territoire sur lequel a compétence un de ses membres ou qui s'y trouvaient au moment de leur décès ». Encore ici, il est question de règlements préétablis, et non d'un avis verbal qu'un évêque donnerait suite à un différent en la matière. Concernant son pouvoir réglementaire, l'article 27 énonce : « La compagnie peut aussi, à l'occasion, par règlement, établir, modifier et abroger des dispositions concernant […] les personnes pouvant être inhumées dans le cimetière et dans les lots concédés ». La même problématique mentionnée précédemment se répète ici. Le dernier article ne parle strictement que des inhumations, et non des mises en niche des urnes cinéraires. Comme nous l'avons déjà mentionné, une telle compagnie peut réglementer uniquement les matières que la loi lui autorise spécifiquement. Donc, même si une compagnie de cimetières faisait approuver un règlement déterminant les conditions d'admission au dépôt des cendres dans ses cimetières et columbariums, nous pouvons nous demander si un tel règlement serait valide. Advenant le cas qu'un conflit relatif à cette ambiguïté devait se rendre devant les tribunaux civils, il serait intéressant de voir si les juges interprèteraient la loi selon le sens strict des mots, ou plutôt selon l'esprit de la loi. Il est à noter qu'en droit canonique, puisqu'il s'agit ici de règles restrictives, le canon 18 prescrirait une interprétation stricte.

1.3.3 — *L'autorité de l'évêque diocésain*

L'administration des cimetières (comme des autres biens ecclésiastiques) revient principalement à la personne morale qui les possède (voir c. 1279). Il faut ajouter cependant qu'il « appartient à l'Ordinaire de veiller avec soin à l'administration de tous les biens appartenant aux personnes juridiques publiques qui lui sont soumises […] [Aussi] les Ordinaires veilleront, par des instructions spéciales dans les limites du droit universel et particulier, à

organiser l'ensemble de l'administration des biens ecclésiastiques » (voir c. 1276). Ce dernier canon ne donne pas une charge administrative directe à l'ordinaire, mais bien un droit de vigilance et un pouvoir réglementaire. La vigilance ne doit pas être ingérence. Tant que l'administrateur direct remplit correctement son devoir, l'ordinaire n'a qu'un droit de regard, mais s'il y a négligence ou abus, celui-ci pourra intervenir directement[43].

« Au Québec, les cimetières catholiques romains à caractère public, vu leur obédience à l'Église catholique romaine, sont tous sujets aux pouvoirs de surveillance et de contrôle de l'évêque du diocèse dans lequel ils sont situés »[44]. Tant pour les fabriques que pour les compagnies de cimetières, l'évêque du lieu est constitué comme leur visiteur.

> Le visiteur peut à toute heure raisonnable visiter la compagnie et se rendre compte de tout ce qui concerne l'administration et la régie de ses œuvres et entreprises. Il peut, mais sans affecter les droits des tiers, l'obliger à faire tout ce qu'il juge utile ou nécessaire pour la régie, l'administration et le perfectionnement de telles œuvres et entreprises et à cesser de faire tout ce qu'il juge inapproprié ou non nécessaire pour telles fins[45].

Le droit de vigilance est ici bien établi. Quant au pouvoir réglementaire, il est donné à l'évêque du diocèse de façon indirecte par les lois civiles. Les fabriques comme les compagnies de cimetières sont autorisées à dresser des règles sur certaines matières, mais ces règlements, pour valoir, doivent être approuvés par le visiteur[46].

Le droit civil québécois, tout comme le droit de l'Église catholique, permet à certaines personnes morales catholiques de posséder et de gérer ses propres cimetières en imposant toutefois quelques limites concernant l'hygiène et son caractère hors commerce. Par surcroît, comme nous venons de le démontrer, la législation civile a intégré des règles canoniques afin que soient respectées les dispositions de l'Église relatives aux cimetières. « Le droit canonique ayant alors été adopté par le législateur, celui-ci l'a fait totalement sien, de sorte que c'est bien de droit québécois et non plus de droit canonique qu'il est désormais question »[47]. En effet, la loi civile ne

[43] Sur le droit de vigilance, voir M. LÓPEZ ALARCÓN, Commentaire du c. 1276, dans *CDCA3*, pp. 1112-1114.

[44] GOSSELIN, *L'environnement juridique*, p. 1.31.

[45] *Loi sur les compagnies de cimetières catholiques romains*, art. 36 ; voir aussi *Loi sur les fabriques*, art. 6.

[46] Voir *Loi sur les fabriques*, art. 19 ; voir aussi *Loi sur les compagnies de cimetières catholiques romains*, art. 26-27.

[47] E. CAPARROS, « Le droit canonique devant les tribunaux canadiens », dans M. THÉRIAULT et J. THORN (dir.), *Unico ecclesiae servitio*, Ottawa, Université Saint-Paul, 1991, p. 314.

fait pas de renvoi au droit canonique, car dans ce cas, si les lois canoniques changeaient, les lois civiles reconnaîtraient implicitement ces changements. La réalité est plutôt que les références au droit canonique sont figées dans la législation québécoise. Pour l'instant, en grande partie, il y a harmonie des systèmes juridiques en matière de cimetières et d'inhumations, bien qu'il faille de temps à autre adapter les lois aux nouvelles réalités sociales. S'il y a un domaine où la loi civile ne s'accorde pas à celle de l'Église, c'est celui de la disposition des cendres des défunts. Nous y reviendrons.

2 — *Principes de gestion et lois civiles relatives aux cimetières*

Abordons maintenant les principes de gestion qui devraient guider les exploitants de cimetières catholiques romains. Ces principes visent non seulement une meilleure rentabilité, mais aussi une règlementation claire qui permette d'éviter des conflits éventuels. De plus, les propriétaires de cimetières doivent tenir compte de certaines lois civiles qui encadrent leur administration. Nous en observerons leur teneur ici.

2.1 — Quelques principes de gestion

Nous avons vu que les personnes juridiques possédant des cimetières sont les premières responsables pour les administrer. Ces personnes donc (particulièrement les fabriques), gérées en grande partie par des fidèles bénévoles, auront besoin d'appui dans leur tâche et c'est le rôle que vient jouer l'évêque diocésain (souvent par des délégués) à travers son pouvoir de vigilance. Si certains diocèses ont promulgué des règles entourant la gestion des cimetières, d'autres ont simplement proposé un guide comme ressource aux paroisses[48]. D'une façon ou d'une autre, certaines balises méritent d'être suivies afin d'harmoniser et les prix, et les règlements des cimetières d'un même diocèse ou d'une même région.

[48] E.g., le diocèse de Saint-Jean-Longueuil a promulgué un *manuel de gestion* qui fixe le cadre à l'intérieur duquel les fabriques peuvent élaborer leurs propres règlements de cimetière (voir ÉVÊQUE DE SAINT-JEAN-LONGUEUIL, Règlement, *Manuel de gestion des cimetières*, 1er avril 2004) (= *Manuel de gestion*). D'autre part, un guide de gestion a été publié en 2010 afin d'outiller les fabriques et les compagnies dans l'administration de leurs cimetières (voir ASSEMBLÉE DES CHANCELIERS ET CHANCELIÈRES DU QUÉBEC ET ASSEMBLÉE DES ÉCONOMES DIOCÉSAINS DU QUÉBEC, *Le cimetière paroissial catholique au Québec : Guide de gestion*, collection Gratianus, Montréal, Wilson & Lafleur, 2010) (= *CPCQ*).

2.1.1 — *Une rentabilité à long terme*

La gestion des cimetières a grandement évolué depuis 50 ans au Québec. Le temps où les familles entretenaient elles-mêmes leur lot et où une grande partie du travail était bénévole est bien révolu. La baisse de la pratique religieuse effrite le lien avec la paroisse et par suite, avec le cimetière. Depuis une trentaine d'année, on voit l'apparition de compagnies privées, profanes, qui exploitent des cimetières et visant la rentabilisation économique en utilisant des techniques modernes de travail comme le marketing et l'informatique. « En effet, la nouvelle rentabilisation créée par l'activité financière de l'entreprise n'est pas réinjectée dans l'exploitation du cimetière en tant que tel, mais sert à d'autres fins qui sont la diversification, le développement et l'enrichissement de l'entreprise elle-même. Cette dimension économique du cimetière privé est tout à fait étrangère à la vocation initiale du lieu »[49]. Si ces nouvelles compagnies créent une forme de compétition avec les exploitants de cimetières catholiques, elles ont néanmoins fait la preuve qu'un cimetière peut être rentable. Les institutions catholiques ont avantage à observer leur méthode et à les utiliser parfois. Toutefois, le cimetière religieux ne devrait pas être détourné de sa mission, le profit ne devant jamais être un objectif. Rappelons également le souci (et l'obligation) de l'Église de donner la sépulture à tout chrétien même démuni. Cela dit, une saine rentabilité permet d'assurer la pérennité des cimetières et ainsi de pourvoir à un lieu convenable de sépulture pour les fidèles. C'est la responsabilité des administrateurs d'agir « en bon père de famille » (voir c. 1284). Par ailleurs, il est intéressant de voir que la CECC a défini l'érection d'un cimetière comme un acte d'administration extraordinaire signifiant ainsi que la prudence est de mise avant de s'engager dans une œuvre dont les coûts et les engagements contractuels s'étaleront nécessairement sur du très long terme[50].

Plusieurs coûts sont à prévoir et à évaluer afin d'assurer une rentabilité dans la gestion d'un cimetière. Plus la détermination de l'ensemble des coûts sera adéquate dans la perspective du long terme, meilleure en sera la santé financière de l'administration du cimetière.

> Or, cet entretien ne se limite pas à couper le gazon. Il doit comprendre un grand nombre d'activités qui font du cimetière un lieu de commémoration et de recueillement : l'entretien annuel des voies de circulation, des clôtures, de l'aménagement paysager, de l'équipement et de la machinerie ; les salaires et les bénéfices d'emploi ; l'ajout de terre pour le nivellement du terrain, etc., et un budget prévu pour couvrir le remplacement des installations qui deviennent

[49] L. GUAY, « Le cimetière vide », p. 128.

[50] Conférence des évêques catholiques du Canada, *Normes complémentaires au code de droit canonique de 1983*, Ottawa, CECC, 1996, décret n° 9 révisé, p. 104.

> désuètes et les améliorations qui devront lui être apportées au cours des années. La fabrique doit donc s'assurer que les fonds soient disponibles et suffisants au moment où elle en aura besoin[51].

De plus, plusieurs des cimetières actuels sont situés dans des villes et villages où les terrains peuvent avoir une grande valeur marchande, ce qui demande de prévoir des sommes en vue du remplacement ou de l'agrandissement éventuel du cimetière. L'accumulation d'un fond dont les intérêts financeront l'entretien et les améliorations futures s'avère sage, voire nécessaire. Si tout cimetière au Québec doit être à but non lucratif, l'expression « ne signifie pas qu'aucun surplus ne puisse être dégagé par l'exploitant d'un cimetière à caractère public. Ce qui est limité ici par le législateur, c'est la possibilité de redistribuer de tels surplus aux membres »[52]. Avoir une administration financière distincte pour le cimetière est nécessaire afin de pouvoir vérifier sa rentabilité et, en cas contraire, de pouvoir s'ajuster vers une gestion saine et convenable.

2.1.2 — *Le contrat de sépulture*

En droit civil, « le contrat est un accord de volonté, par lequel une ou plusieurs personnes s'obligent envers une ou plusieurs autres à exécuter une prestation »[53]. Le contrat de sépulture comporte aussi ses obligations propres qui méritent d'être précisées. Déjà en 1870, un code en vigueur dans le diocèse de Montréal énonçait que « la fabrique ne peut aliéner aucune partie du cimetière, tant qu'il conserve cette destination ; ce n'est qu'une permission et un usage exclusif concédé à une personne moyennant une offrande ou somme arrêtée d'avance »[54]. Le contrat de sépulture ne peut donc pas être qualifié de contrat de vente. On peut parler d'un contrat de concession par lequel une personne (le concessionnaire) obtient le droit d'utilisation, pour une période déterminée, d'un emplacement funéraire destiné à recevoir les restes d'une ou de plusieurs personnes, en contrepartie d'un paiement. Le droit d'utilisation d'un lot qu'obtient un concessionnaire se circonscrit en deux aspects : le droit à l'inhumation dans ce lot (pour lui-même et les personnes qu'il aura désignées) et le droit d'installer un monument funéraire selon les règles établies au contrat (ou dans le règlement du cimetière). Ce contrat inclut généralement un service d'entretien de cet emplacement funéraire. On dit que ce contrat est

51 *Manuel de gestion*, p. 51.203.

52 GOSSELIN, *L'environnement juridique*, p. 1.3.

53 *CcQ*, art. 1378.

54 J. V. BEAUDRY, *Code des curés, marguillers et paroissiens*, Montréal, Presse de La Minerve, 1870, p. 257.

anticipé lorsqu'il est conclu du vivant du concessionnaire. Toutefois, un exploitant d'un cimetière catholique romain n'est pas soumis à la loi sur les arrangements préalables de services funéraires et de sépulture si ses contrats de concession sont conclus *directement* avec le concessionnaire et ont comme *seul objet* un bien ou un service fourni *dans* son cimetière[55].

Regardons maintenant les dispositions relatives à la durée du contrat. Une clarification mérite d'être apportée autour de la notion de perpétuité. En effet, une opinion populaire subsiste à savoir que l'Église s'engage à jamais à perpétuer le lieu de sépulture des défunts et à entretenir ces lots. Plusieurs anciens contrats de sépulture portent la mention de perpétuité ; d'autre part, il arrive que les successeurs d'un concessionnaire décédé allèguent cette durée illimitée suite à un contrat verbal ou disparu. Est-ce que le concept de contrat perpétuel est juridiquement tenable ? « L'expérience a démontré que les contrats à très long terme, presque fatalement, sont condamnés à devenir inéquitables : hausse du coût de revient, affaissement ou encore développement extraordinaire du marché, nouvelles techniques de production ou autres causes semblables font que le marché, conclu il y a quelques décennies, est devenu une très mauvaise affaire, parfois une catastrophe qui paralyse une des parties, locateur ou locataire »[56]. Depuis l'entrée en vigueur du nouveau Code civil du Québec, le 1er janvier 1994, la notion de perpétuité a été fixée à 100 ans[57]. « Cet article, de droit nouveau, a pour but de mettre fin à la controverse sur la validité du bail perpétuel, en l'interdisant expressément »[58]. Concernant la situation avant cette date, l'assemblée des chanceliers et chancelières du Québec se prononce en disant qu' « après consultation auprès de conseillers juridiques, nous sommes d'avis que tous les contrats de concession "à perpétuité" signés avant 1994 ont une durée de 99 ans à compter de la signature du contrat »[59].

> […] nous devons conclure qu'en vertu du droit civil québécois il n'existe aucun droit de « concession » à perpétuité d'un lot de cimetière catholique

[55] Voir *Loi sur les arrangements préalables de services funéraires et de sépulture*, LRQ, chapitre A-23.001, art. 2, alinéa 1. Certaines compagnies de cimetières catholiques romains offrent des services funéraires plus étendus tels que la crémation, le transport, l'embaumement et l'exposition des corps. Sans analyser toutes les conséquences qu'entraine cette pratique, il est fort possible que certains de ces services offerts soient soumis à la loi sur les arrangements préalables.

[56] P.-G. JOBIN, *Le louage,* 2e édition, Cowansville, Éditions Yvon Blais, 1996, pp. 488-489.

[57] Voir *CcQ*, art. 1880.

[58] QUÉBEC, MINISTÈRE DE LA JUSTICE, *Commentaires du ministre de la Justice : le Code civil du Québec*, *tome II*, Québec, Publications du Québec, 1993, p. 1181, art. 1880.

[59] *CPCQ*, p. 6. Notons cependant que d'autres interprétations circulent, tel celle de la firme d'avocat Monette Barakett qui suggère de commencer à compter les 100 ans à partir de 1994. Ainsi, tous les contrats passés avant 1994 et dit « à perpetuité » viendraient à échéance en 2094.

> romain, quoiqu'il puisse valablement exister un droit de renouvellement périodique d'un droit d'utilisation de l'emplacement funéraire par période de durée maximale de cent ans. Prétendre à l'existence d'un droit de « concession » à perpétuité d'un emplacement funéraire d'un cimetière catholique romain serait de nier le caractère sacré et hors commerce d'un tel cimetière et d'aliéner indirectement ce qui ne peut l'être directement[60].

2.1.3 — *L'importance du règlement de cimetière*

Les propriétaires de cimetières catholiques romains ont tout avantage à établir un règlement de cimetière complet ; celui-ci est « un outil juridique indispensable […] [il] détermine les responsabilités de l'exploitant de cimetière et sert de base à l'interprétation de tout contrat de biens et services funéraires conclu par cet exploitant de cimetière »[61]. Lorsqu'il est clair, il permet de préciser la portée du contrat liant les deux parties, évitant d'éventuels conflits[62]. Pour ce faire, il devrait d'abord définir la terminologie spécifique au cimetière. Ensuite, les points de règlement peuvent être énoncés et doivent nécessairement porter sur les objets mentionnés expressément dans la loi constitutive de la personne morale qui édicte ce règlement. Comme nous l'avons déjà mentionné, un excès de juridiction entraîne un règlement invalide. Ces points sont, par exemple, les conditions de concession d'un emplacement funéraire, les droits et obligations du concessionnaire, la dévolution des lots (pour les compagnies de cimetières seulement), les règles entourant l'ouvrage funéraire et ses inscriptions, l'entretien et autres dispositions diverses.

À titre démonstratif, voyons plus en détail l'importance du règlement de cimetière relativement à la dévolution d'un lot. Puisqu'il n'y a qu'un seul concessionnaire par lot, il est opportun que ce dernier désigne un successeur, que l'on peut nommer titulaire. Cette désignation peut être faite à même le

60 GOSSELIN, *L'environnement juridique*, p. 2.75.

61 Ibid., p. 1.69.

62 Dans une cause de 2002 portée devant la cour du Québec, une fabrique évite la poursuite en démontrant qu'elle avait appliqué et respecté son propre règlement de cimetière. Cinq frères se sont portés acquéreur d'un lot de cimetière et d'un monument funéraire en se partageant les frais. Mais dans les faits, selon le règlement de cimetière de la fabrique en question, un seul d'entre eux était le concessionnaire du lot, les quatre autres l'ignorant. Au décès de ce dernier, c'est son épouse qui a repris la concession. Un des frères a tenté de poursuivre et l'épouse et la fabrique pour préjudice subit tout en réclamant les frais investis. Le tribunal a alors reconnu que la fabrique avait respecté ses règlements (celui de 1902 et de 1982) qui stipulaient clairement qu'un lot ne peut être concédé qu'à une seule personne (voir *Magny c. Veillette et fabrique de Saint-Stanislas*, 5 novembre 2002, (CQ), (disponible sur SOQUIJ)).

contrat de concession, ou dans un testament ou tout autre écrit[63]. En l'absence de titulaire au décès du concessionnaire, il revient aux héritiers de désigner le nouveau concessionnaire unique, à moins que, dans le cas d'une compagnie de cimetière, un règlement ne prévoit la dévolution du lot. Et s'il y avait entre les héritiers un litige qui s'étirait dans le temps, l'exploitant de cimetière sans règles de dévolution se retrouverait les mains liées. Il lui serait impossible de procéder, sur ce lot, à des inhumations autres que celles autorisées par le concessionnaire défunt ni même de modifier l'ouvrage funéraire. Un règlement de cimetière pourrait spécifier un délai (120 jours par exemple) à l'intérieur duquel les héritiers doivent statuer d'un nouveau concessionnaire et confirmer cette entente par écrit à l'exploitant de cimetière[64].

2.2 — Quelques lois civiles à prendre en considération

La loi sur les inhumations et les exhumations impose quelques règles à suivre dans la pratique des sépultures au Québec, principalement dans le but d'assurer l'hygiène public. On y retrouve entre autre des dispositions sur la profondeur des fosses, la composition des enfeus, les charniers publics, le transport des cadavres et les précautions particulières relativement aux cadavres de personnes mortes de maladies contagieuses. Aussi, l'article 3 édicte : « Aucune inhumation ne doit être faite ailleurs que dans un cimetière légalement établi, sauf les cas autrement prévus par la loi »[65]. Parmi ces cas d'exceptions, on peut mentionner celui de l'article 7 qui prévoit la possibilité d'inhumer des cadavres dans une église ou chapelle, mais toujours avec l'autorisation expresse de l'autorité ecclésiastique[66]. Concernant les exhumations, il faut suivre la procédure établie par cette loi, soit à l'article 16 pour un seul cadavre, ou aux articles 17 à 20 pour la fermeture d'un cimetière. Notons que les sépultures sont par nature perpétuelles. Les exhumations doivent être des exceptions appuyées de justes motivations afin de préserver le caractère sacré des cimetières et des corps des défunts. Enfin, cette loi renvoie à quelques reprises à l'autorité ecclésiastique, laquelle est compétente pour : juger de l'admission des défunts dans la partie bénie du cimetière, autoriser l'inhumation dans une église ou chapelle, permettre l'exhumation de cadavres provenant de l'un de ses cimetières[67].

63 Voir *CPCQ*, p. 6.

64 Voir GOSSELIN, *L'environnement juridique*, p. 6.15.

65 *Loi sur les inhumations et les exhumations*, LRQ, chapitre I-11, art. 3.

66 Voir ibid., art. 7 (1).

67 Cette dernière disposition de la loi, énoncée à l'article 16 (3) de la loi sur les inhumations et les exhumations, reprend le canon 1214 du *CIC*/17, à l'exception qu'elle exige une autorisation en

La loi sur la protection des sépultures des anciens combattants et des sépultures de guerre apporte certaines conditions à l'exploitant de cimetière. « L'administrateur d'un cimetière est tenu d'assurer la protection des sépultures des anciens combattants et des sépultures de guerre se trouvant dans ce cimetière. Les restes ou le monument funéraire de ces sépultures ne peuvent, notamment, être déplacés que d'une façon qui permet de les retrouver »[68]. Certains arrangements financiers peuvent être convenus avec le ministre fédéral responsable ou la commission des sépultures de guerre du Commonwealth afin de respecter les exigences de cette loi.

Ajoutons à la liste des législations que doit connaître un exploitant de cimetière la loi sur la fiscalité municipale. Cette loi exempte de toute taxe foncière, municipale ou scolaire, « un immeuble qui sert de cimetière pour les êtres humains, sauf s'il est exploité dans un but lucratif »[69]. Le caractère non lucratif d'un exploitant de cimetière catholique romain va de soi (par sa nature en plus d'être exigé par la loi). Toutefois, en contexte québécois, des associations entre des exploitants de cimetières et des entreprises funéraires se sont réalisées, particulièrement dans le milieu non confessionnel. « Ainsi donc, si le volet centre funéraire est exploité dans un but lucratif, cette "entreprise" est alors sujette à la taxation foncière, peu importe son ou ses propriétaires en titre. Ceci nous amène à suggérer fortement que l'espace au sol sur lequel serait érigé cet éventuel centre funéraire soit loti spécifiquement de façon qu'il constitue un lot distinct de celui ou ceux actuellement utilisés aux fins de cimetière »[70].

2.3 — La disposition des cendres cinéraires

Le choix de l'incinération des corps des défunts est de plus en plus populaire au Québec. Cette option, qui était interdite dans le *CIC*/17 (voir cc. 1203 ; 1240, § 1, 5°) en raison de la foi de l'Église en la résurrection des corps, est permise chez les catholiques depuis 1963[71]. Le Code de 1983 est

exhumation, venant de l'autorité ecclésiastique, seulement pour les lieux catholiques, alors que le canon 1214 semblait concerner tous les fidèles, peu importe le lieu de l'inhumation.

[68] Projet de loi n° 26, Loi sur la protection des sépultures des anciens combattants et des sépultures de guerre, 18 décembre 2003, dans *Gazette officielle du Québec*, partie II, 14 janvier 2004, 136e année, n°2, pp. 91-94, art. 2.

[69] *Loi sur la fiscalité municipale*, LRQ, chapitre F-2.1, art. 204 (9).

[70] GOSSELIN, *L'environnement juridique*, p. 2.92.

[71] Voir SUPRÊME SACRÉE CONGRÉGATION DU SAINT-OFFICE, Instruction sur la crémation des cadavres *Piam et constantem*, 8 mai 1963, dans *AAS*, 56 (1964), pp. 822-823, traduction française dans *DC*, 61 (1964), col. 1711-1712. Dans cette instruction, on peut parler davantage de tolérance envers l'incinération, l'Église y gardant encore une aversion (*animus alienus*).

venu reconnaître plus largement cette pratique, en rappelant toutefois que l'Église préfère l'inhumation des corps (voir cc. 1176 ; 1184). « […] Peu importe que le corps soit inhumé ou incinéré, l'Église y voue la même considération. Elle y voit toujours les restes d'une créature de Dieu, qui a été habitée par l'Esprit Saint et qui est promise à la résurrection […] Elle les dépose ensuite dans un lieu bénit où les proches, de même que toute autre personne, peuvent se rendre pour se recueillir »[72].

Ce respect dû aux cendres des défunts ne se manifeste pas dans la législation civile québécoise. Avant 1985, la loi était claire : « Les cendres provenant d'une crémation doivent être enterrées dans un cimetière ou déposées dans une boîte ou urne de métal identifiée au nom du défunt et conservées dans un columbarium à moins que le défunt n'ait manifesté par écrit le désir qu'il en soit disposé autrement »[73]. Mais depuis le 8 mai 1985, date à laquelle cet article de loi fut abrogé, il existe un vide juridique autour de la disposition des cendres des défunts. Il appert également que l'actuelle loi sur les inhumations et les exhumations n'a comme objet que les corps des défunts et non pas les cendres cinéraires, ce qui ne laisse aucune règle assurant un lieu stable et permanent pour le dépôt de ces cendres[74]. Ce flou juridique donne lieu à des situations absurdes qui portent gravement atteinte au respect dû au corps après le décès. À défaut d'une loi civile claire, le règlement de cimetière doit pallier la lacune et disposer de la question[75].

Dans son mémoire déposé auprès du ministre de la santé et des services sociaux, l'assemblée des évêques catholiques du Québec est arrivée à la

[72] ASSEMBLÉE DES ÉVÊQUES CATHOLIQUES DU QUÉBEC, Mémoire présenté au ministre de la santé et des services sociaux sur *La nécessité d'une réglementation relative à la disposition des cendres des défunts*, octobre 2010, http ://www.eveques.qc.ca/documents/2010/20101025.html (3 septembre 2014), p. 4 (= Mémoire sur les cendres). Les fidèles qui font le choix de l'incinération sont invités à donner une sépulture décente aux cendres cinéraires du défunt (voir aussi CONGRÉGATION POUR LE CULTE DIVIN ET LA DISCIPLINE DES SACREMENTS, Directoire sur la piété populaire et la liturgie, principes et orientations, 17 décembre 2001, Paris, Cerf, 2003, n° 254).

[73] *Règlement sur l'application de la loi sur la protection de la santé publique*, LRQ, chapitre P-35, R.1, art. 60.

[74] Voir GOSSELIN, *L'environnement juridique*, pp. 4.26-4.27 ; voir aussi F. LEFEBVRE, « La disposition des cendres », dans *Trait d'union*, 11 (2003), p. 6.

[75] Me Gosselin, dans son ouvrage, suggère des exemples de règlement que les fabriques et compagnies de cimetières ont tout avantage à utiliser. Il propose entre autre : « La disposition des restes humains dans le cimetière est définitive et perpétuelle. Aucun retrait ou exhumation n'est autorisé sans l'approbation de l'autorité civile et de l'autorité catholique romaine. Le cas échéant, tout déplacement est aux entiers frais du requérant » ; et encore : « Préalablement à l'enfouissement ou au dépôt en niche des cendres d'un défunt, l'utilisateur ou ses ayant droit, doivent certifier que l'urne est l'unique contenant de la totalité des cendres du défunt » (GOSSELIN, *L'environnement juridique*, pp. 4.23 ; 4.25).

conclusion que « étant donné le respect dû aux personnes défuntes et à leurs restes ; la nécessité que l'on puisse faire mémoire des défunts ; la nécessité de favoriser les conditions favorables pour bien vivre les deuils ; nous proposons que le gouvernement du Québec légifère afin que dorénavant l'on dispose des cendres de la même façon que l'on dispose des corps »[76]. Mais puisqu'une telle loi tarde toujours à venir, les fidèles sont invités à suivre la voix de leurs évêques qui rappellent :

> En vertu du même respect dû à la personne humaine et à sa condition corporelle, il nous paraît inconvenant que les cendres soient jetées à l'eau, dispersées à tout vent, ou conservées dans un lieu privé dont la propriété et l'usage peuvent changer. Il convient qu'elles soient plutôt déposées dans un lieu public, cimetière ou mausolée. On s'assure ainsi d'un lieu de mémoire pour les générations futures[77].

3 — *Dispositions législatives purement ecclésiastiques*

Dans ce dernier chapitre, nous présenterons ce que prescrivent le Code de droit canonique et les différents documents de l'Église au sujet des cimetières. D'abord, nous verrons comment l'Église traite ce lieu sacré en édictant des règles sur la bénédiction, la profanation et la réduction à l'usage profane ; ensuite nous étudierons ce que comporte le droit à la sépulture ; puis nous nous attarderons sur la possibilité d'enterrer des cadavres dans les églises et les difficultés que cette règle implique. Enfin, quelques particularités du Code des Églises orientales seront présentées.

3.1 — Le cimetière comme lieu sacré

« Les lieux sacrés sont ceux qui sont destinés au culte divin ou à la sépulture des fidèles par la dédicace ou la bénédiction que prescrivent à cet effet les livres liturgiques » (c. 1205). Voilà que le Code de droit canonique classe le cimetière parmi les lieux sacrés, en autant qu'il reçoit ces deux éléments, soit : l'affectation à la sépulture des fidèles et la bénédiction liturgique. Le caractère sacré d'un lieu entraîne l'obligation de respecter sa sainteté et donne à l'autorité ecclésiastique le droit d'édicter des normes pour la protéger et la conserver.

[76] Mémoire sur les cendres, pp. 6-7.

[77] ASSEMBLÉE DES ÉVÊQUES CATHOLIQUES DU QUÉBEC, Réflexion *En fin de vie... prendre soin, dans le respect de la dignité humaine*, 3 novembre 2005, http://www.eveques.qc.ca/documents/2005/20051103f.html (5 novembre 2012), pp. 8-9.

3.1.1 — *La bénédiction*

L'Église demande à ce que les cimetières reçoivent la bénédiction et à ce qu'on y dresse une croix[78]. Le Code de 1917 parlait d'une bénédiction constitutive (voir c. 1148, § 2 du *CIC*/17) ; sans être mentionné, c'est encore le cas aujourd'hui. La bénédiction d'un cimetière le constitue comme un lieu sacré en le destinant exclusivement à des usages sacrés[79]. Puisqu'il s'opère un changement de caractère permanent, il est requis que la bénédiction soit notifiée par un acte qui sera conservé et aux archives diocésaines, et à la paroisse responsable du cimetière (voir c. 1208). Comme nous l'avons vu précédemment, les lois civiles du Québec permettent la possession de cimetières propres à l'Église catholique. Il va donc de soi que chacun d'eux soit béni selon le rite liturgique prescrit[80]. L'accomplissement de cette bénédiction revient de droit à l'ordinaire, lequel peut la déléguer à un autre prêtre (c. 1207). Le livre des bénédictions précise : « Il convient que la bénédiction d'un cimetière soit accomplie par l'évêque du diocèse ; mais il peut confier cette tâche à un prêtre »[81]. Dans la situation où un fidèle venait qu'à se faire inhumer dans un cimetière autre que catholique (pour être auprès d'un membre de sa

[78] Voir *De benedictionibus*, *editio typica*, 31 mai 1984, Typis polyglottis Vaticanis, 1985, traduction française « Livre des bénédictions » dans *Bulletin national de liturgie*, 21 (1987), nos 110-112, Ottawa, CECC, 1987, n° 1115, p. 114 (= Livre des bénédictions). Voir aussi c. 1240. « Le simple fait de l'inhumation ne suffit donc pas à faire d'une sépulture un lieu sacré […] Même quand [le cimetière] est contigu à l'église, il ne peut pas être considéré comme ayant été bénit indirectement ou accessoirement par suite de la consécration de l'église […] » (R. NAZ, art. « Cimetière », dans *Dictionnaire de droit canonique*, vol. 3, Paris, Letouzey et Ané, 1942, col. 735-736).

[79] Par comparaison distinctive, la bénédiction invocative implore la faveur et la protection de Dieu sur une personne, une place, un objet, un animal, etc. ; cela ne change pas son caractère, c'est-à-dire qu'il n'a pas lieu que cet endroit ou cet objet ainsi béni soit utilisé exclusivement à des fins sacrées (voir J. M. HUELS, *The Pastoral Companion : A Canon Law Handbook for Catholic Ministry,* 4e édition, collection Gratianus, Montréal, Wilson & Lafleur, 2009, p. 335) (= *Pastoral Companion*).

[80] On suivra la *bénédiction d'un cimetière* que l'on retrouve au Livre des bénédictions, pp. 114-120. Le jour recommandé pour la bénédiction d'un cimetière est le dimanche, en présence du peuple rassemblé ; mais tout autre jour est permis à l'exception du mercredi des Cendres et de la semaine sainte (voir Livre des bénédictions, n° 1117, p. 114). Le Cérémonial des évêques mentionne l'emploi de vêtements liturgiques de la couleur appropriée alors que le pontifical romain de 1961 indiquait le violet, et non plus le blanc comme auparavant (voir *Caeremoniale episcoporum*, *editio typica cum reimpressio altera*, 14 septembre 1984, Libreria editrice Vaticana, 1995, adaptation française *Cérémonial des évêques*, Paris, Desclée/Mame, 1998, n° 1057, p. 274 ; voir *Pontificale romanum*, *editio iuxta typicam*, 13 avril 1961, Typis polyglottis Vaticanis, 1961, p. 181).

[81] Livre des bénédictions, n° 1116, p. 114.

famille par exemple), sa tombe devrait être bénie individuellement[82]. C'est alors la personne qui préside aux funérailles qui prononcera cette bénédiction, une fois rendu au cimetière[83]. Lorsqu'un corps est exhumé pour être ré-inhumé, aucun rite n'est prévu pour cette nouvelle inhumation[84]. À la demande d'un fidèle, un ministre pourrait adapter le rituel existant ou utiliser toutes autres prières appropriées. Si la nouvelle inhumation devait se faire dans un cimetière non catholique, il serait de mise de procéder à la bénédiction de la tombe.

3.1.2 — *La profanation d'un cimetière*

« Les lieux sacrés sont profanés par des actions gravement injurieuses qui y sont commises au scandale des fidèles et qui, au jugement de l'Ordinaire du lieu, sont si graves et contraires à la sainteté du lieu qu'il ne soit pas permis d'y célébrer le culte tant que l'injure n'a pas été réparée par le rite pénitentiel prévu par les livres liturgiques » (c. 1211). Le Code de 1917 avait une liste limitative et objective de ce qui constituait une profanation (c. 1172, § 1) alors que le Code de 1983 renvoie au jugement de l'ordinaire du lieu, ce qui permet une discipline plus souple et davantage adaptée aux mentalités locales[85]. En cas de profanation, aucune sépulture ne sera effectuée avant que soit prononcé le rite pénitentiel[86]. Une juste peine sera imposée à l'auteur de la profanation (c. 1376).

[82] Dans ce cas, il faut faire la bénédiction telle que proposée au rituel des funérailles (voir *Ordo exsequiarum*, *editio typica*, 15 août 1969, Typis polyglottis Vaticanis, 1969, traduction française *Prières pour les défunts à la maison et au cimetière : Nouveau rituel des funérailles*, Paris, Desclée/Mame, 1972, nos 263, 295-298, pp. 42, 62-63). Notons que dans la traduction française du rituel, il est dit : « Si la tombe n'a pas encore été bénie, *on pourra la bénir* au moment le plus opportun » [mise en relief ajoutée] (ibid., n° 263, p. 42) ; pourtant, le texte latin dit bien *benedicatur* (sera bénie ou doit être bénie) (voir *Ordo exsequiarum*, *editio typica*, n° 53), ce qui dénote à tout le moins une exhortation (réitérée au c. 1240, § 2) et non une simple possibilité.

[83] Puisque les diacres, et aussi des laïcs, peuvent présider aux funérailles, ils pourront aussi bénir la tombe selon le rite. Toutefois, cette bénédiction n'est certainement qu'invocative et non constitutive, ne faisant pas de chaque fosse un lieu sacré (voir S. MANY, *De locis sacris*, Paris, Letouzey et Ané, 1904, p. 243).

[84] Voir *Pastoral Companion*, pp. 356-357.

[85] Voir J. T. MARTÍN DE AGAR, Commentaire du c. 1211, dans *CDCA3*, p. 1057.

[86] Le rite prévu à cet effet n'a jamais été traduit en langue française. Il se retrouve, en latin, au *Rituale Romanum* de 1957 ou au *Pontificale Romanum* de 1961 (voir *Rituale romanum*, *editio prima post typicam*, 21 novembre 1953, Typis polyglottis Vaticanis, 1957, pp. 598-602 ; voir aussi *Pontificale romanum*, *editio iuxta typicam*, 13 avril 1961, Typis polyglottis Vaticanis, 1961, pp. 193-194).

3.1.3 — *La perte de la bénédiction*

Bien que la bénédiction d'un cimetière soit constitutive, lui imprimant un caractère permanent, il est possible qu'il perde cette bénédiction. Deux manières sont envisagées par le canon 1212 : soit par décret de l'ordinaire, de façon volontaire donc, soit de fait, indépendamment de la volonté de l'Église. Deux situations de fait provoquant l'exécration sont envisagées : la destruction d'une majeure partie du cimetière (e.g., glissement de terrain, inondation majeure, bombardements, etc.) ou sa réduction à un usage profane permanent (e.g., réquisition de force par le pouvoir civil ou militaire). Dans tous ces cas, si l'Église venait qu'à réutiliser le même terrain pour un cimetière, elle devrait le bénir à nouveau. Les cas de réduction à l'usage profane par décret se rencontre ici et là au Québec. On peut penser aux diverses maisons de communautés religieuses qui sont vendues ; lorsqu'un cimetière leur est attenant, il est souvent préférable de le fermer que de le laisser sans surveillance, voir à l'abandon. Puisqu'un cimetière sert expressément à la sépulture, un décret lui retirant sa bénédiction oblige que chacun des cadavres et ossements des défunts soit exhumé pour être ré-inhumé dans un autre cimetière, le tout en conformité avec la loi québécoise sur les inhumations et les exhumations[87].

3.2 — Le droit à la sépulture

Le sens commun nous amène à penser que la sépulture ecclésiastique revient à tous les fidèles défunts. C'est la règle générale à laquelle il faut attacher quelques exceptions, et restrictives et permissives. Ce droit à la sépulture comporte un droit de choisir son cimetière, toutefois dans une certaine limite que nous préciserons dans la présente section.

3.2.1 — *L'accès à la sépulture dans un cimetière catholique romain*

L'accès à la sépulture ecclésiastique n'est traité que de façon indirecte dans le Code de droit canonique. Nous pouvons affirmer dans un premier temps que ceux qui reçoivent les funérailles ecclésiastiques ont nécessairement droit à la sépulture dans un cimetière catholique, car l'inhumation (ou

[87] Le c. 1222 expose quelques règles à suivre pour réduire une église à un usage profane. Ces règles peuvent inspirer la procédure concernant l'exécration des cimetières, mais elles n'obligent pas. Par exemple, la consultation du conseil presbytéral peut être souhaitable, mais pas obligatoire. Notons que pour le cas des églises, c'est l'évêque diocésain qui a autorité pour agir, alors que pour les cimetières, c'est l'ordinaire.

le dépôt des cendres dans un columbarium) fait partie du rite des funérailles. Ces funérailles sont accordées aux fidèles défunts, selon le droit (voir c. 1176, § 1) qui est lui-même précisé aux canons 1183 et 1184. De ces canons, nous pouvons identifier ceux qui peuvent être ensevelis dans le lieu sacré du cimetière : 1) tous les fidèles défunts, à moins qu'ils n'aient été privés des funérailles ecclésiastiques selon le canon 1184, § 1 (fidèles signifie ici les baptisés dans l'Église catholiques et ceux qui y ont été reçu) ; 2) les catéchumènes ; 3) les petits enfants que leurs parents désiraient faire baptiser ; 4) les baptisés non-catholiques, lorsqu'ils n'ont pas de cimetière propre[88]. Si les deux premiers groupes ont un droit à la sépulture ecclésiastique, les autres (soient les petits enfants et les baptisés non-catholiques) n'y ont accès qu'avec la permission de l'ordinaire du lieu[89]. Concernant les baptisés non-catholiques, il semble qu'il y ait d'autres situations, outre l'absence de cimetière propre, qui puissent justifier leur sépulture dans un cimetière catholique, telle le désir d'être auprès d'un conjoint catholique[90].

La question se pose à savoir si un non-baptisé peut être enterré dans un cimetière catholique. Rappelons d'abord que le cimetière est un lieu sacré, destiné à la sépulture des fidèles par la bénédiction (voir c. 1205). À priori, cette destination est exclusive, c'est-à-dire qu'un non-fidèle ne trouverait pas sa place dans un cimetière catholique. « […] Cependant l'ordinaire peut permettre occasionnellement d'autres usages qui ne soient pourtant pas contraire à la sainteté du lieu » (c. 1210). Il s'agit précisément de déterminer si le fait d'enterrer un non-baptisé dans le cimetière sacré est contraire à la sainteté du lieu. Les notes préliminaires du rituel de la bénédiction d'un cimetière apportent un élément de réponse : « […] dans leurs cimetières les chrétiens inhument et honorent les corps non seulement de ceux qui sont devenus frères par la foi, mais aussi de ceux qui sont de la même condition humaine : en versant son sang pour tous les hommes, le Christ les a tous

88 Cette norme est tirée du CONSEIL PONTIFICAL POUR LA PROMOTION DE L'UNITÉ DES CHRÉTIENS, Directoire pour l'application des principes et des normes sur l'œcuménisme, 25 mars 1993, dans *AAS*, 85 (1993), n° 137, p. 1090 (= DAPNOE).

89 Dans le cas des baptisés non-catholiques, le DAPNOE, n° 137 identifie plutôt l'évêque diocésain comme étant l'autorité compétente pour accorder cette permission. Pourtant, le c. 1183, § 3 donne à l'ordinaire du lieu la faculté d'accorder le rite des funérailles à des baptisés non-catholiques n'ayant pas manifestés de volonté contraire et lorsque leur ministre n'est pas disponible. Puisque l'ordinaire du lieu peut accorder les funérailles à un baptisé non-catholique, il peut également permettre sa sépulture dans le cimetière catholique selon le principe de qui peut le plus, peut le moins.

90 Voir CATHOLIC CEMETERY CONFERENCE, *Christian Burial Guidelines*, Des Plaines, Illinois, 2005, pp. 26-27 (= *Guidelines*).

rachetés sur la croix »[91]. Puisqu'il n'y a aucune interdiction absolue dans le droit de l'Église contre l'enterrement de non-baptisés dans un cimetière catholique, un ordinaire pourrait permettre cette exception, particulièrement dans les situations de mariage mixte, pourvu que le danger de scandale soit écarté[92]. On parle ici de circonstances non habituelles qui doivent donc être évaluées au cas par cas par l'ordinaire.

Quelques cas spéciaux méritent d'être mentionnés. L'Église recommande que les enfants mort-nés et les fœtus de parents catholiques soient enterrés dans leur cimetière[93]. De même, les membres amputés peuvent être déposés tant dans un lot communautaire qu'un lot individuel[94]. Notons finalement que « dans le cas de suicide, les funérailles chrétiennes peuvent être accordées [de même que la sépulture], car on peut généralement douter de la responsabilité morale de cette personne au moment où l'acte a été posé »[95].

3.2.2 — *Le lieu de la sépulture*

En ce qui concerne le choix du lieu de sépulture, nous étalerons d'une part les droits et les devoirs des fidèles, d'autre part, ceux de la paroisse. Le canon 1180, § 2 pose clairement le droit de chaque fidèle de choisir le lieu de sa sépulture (à moins d'en être empêché par le droit)[96]. Le premier paragraphe du même canon souligne deux aspects de ce choix : premièrement, qu'il peut être fait par le fidèle lui-même ou par ceux qui sont légitimement responsables de sa sépulture après son décès, deuxièmement, qu'il doit être

[91] Livre des bénédictions, n° 1115, p. 114.

[92] Voir P. M. DUGAN, « Burial in Catholic Cemetery », dans A. J. ESPELAGE (dir.), *CLSA Advisory Opinions 2001-2005*, Alexandria, VA, Canon Law Society of America, 2006, pp. 323-324.

[93] Voir *Guidelines*, p. 32.

[94] Voir ibid., p. 33.

[95] ASSEMBLÉE DES ÉVÊQUES DU QUÉBEC, *Guide canonique et pastoral au service des paroisses,* 2e édition révisée et mise à jour, collection Gratianus, Montréal, Wilson & Lafleur, 2004, p. 144.

[96] Cette incise restrictive n'est nulle part précisée dans le *CIC*. Le *CIC*/17, au canon 1224, mentionnait les impubères et les religieux profès comme personnes à qui il était interdit de choisir librement un cimetière. Sous la loi actuelle, c'est dans le droit particulier, incluant les statuts des instituts religieux, que l'on peut trouver une telle interdiction. Rappelons que les mineurs (moins de 18 ans accomplis) sont soumis à la puissance de leurs parents ou tuteurs dans l'exercice de leurs droits (voir c. 98, § 2), ce qui concorde avec la loi civile québécoise. L'article 42 du *CcQ* stipule : « Le majeur [18 ans et plus] peut régler ses funérailles et le mode de disposition de son corps ; le mineur le peut également avec le consentement écrit du titulaire de l'autorité parentale ou de son tuteur […] ».

légitime, c'est-à-dire en accord avec ce que la loi prescrit autre part[97]. Par ailleurs, le cimetière propre à la paroisse du défunt est toujours un choix légitime, sans aucune condition. Quant au devoir des fidèles, il semble que ce qui s'applique aux funérailles au canon 1177, § 2 devrait aussi concerner les cimetières. C'est donc dire qu'un fidèle qui choisi un cimetière spécifique devrait en informer son curé propre.

En contrepartie, la paroisse a le devoir d'assurer la sépulture à chacun de ses paroissiens[98]. Est tenue à ce même devoir la paroisse dans laquelle survient le décès d'un fidèle lorsqu'il est difficile de transporter le corps dans la paroisse propre du défunt[99]. Le curé a le droit d'être informé lorsqu'un de ses paroissiens est inhumé dans un autre cimetière.

3.3 — Le cas du canon 1242

Le canon 1242 est celui qui interdit les inhumations dans les églises, à l'exception des dépouilles du Pontife Romain, des cardinaux et des évêques diocésains, même émérites, lesquels ont un droit à être enterré dans leur église propre. Au Québec, la pratique fut jadis bien prisée, c'est-à-dire que les fidèles, prêtres ou laïcs, désiraient être enterrés près des saints, dans le sanctuaire de Dieu[100]. Mais déjà au début du 18ème siècle, l'Église de Qué-

[97] Par exemple, le fidèle, ou ses répondants, doit obtenir le consentement de l'administrateur du cimetière, lequel ne devrait refuser que pour des raisons très sérieuses (voir W. H. WOESTMAN, « Refusal of Funeral Mass and Burial from a Parish Church », dans A. J. ESPELAGE (dir.), *CLSA Advisory Opinions 2001-2005*, Alexandria, VA, Canon Law Society of America, 2006, pp. 322-323). Autre exemple, le choix d'une église comme lieu de sépulture est illégitime s'il va contre le canon 1242.

[98] Voir c. 1180, § 1. La paroisse d'un fidèle est déterminée par le domicile ou le quasi-domicile de celui-ci, ou encore par l'endroit où il demeure de fait s'il s'agit d'un *vagus* (voir les cc. 100-107). Si un paroissien se voyait refuser les funérailles ecclésiastiques, il pourrait tout de même avoir sa place dans la partie non bénie du cimetière [Rappelons que le Code de 1917 au canon 1212 demandait qu'il y ait, en plus du cimetière béni, un autre lieu, fermé et gardé, où seraient enterrés ceux à qui n'était pas accordée la sépulture ecclésiastique. Bien que cette norme n'ait pas été reprise dans le Code de 1983, elle a gardé sa trace dans la législation québécoise, soit à l'article 5 de la loi sur les inhumations et les exhumations, tel que cité ci-haut]. D'autre part, l'impossibilité de défrayer les coûts de la sépulture ne doit pas empêcher aucun fidèle de jouir de son droit (voir c. 1181). Au Québec, les frais d'inhumation ou de crémation d'un corps non réclamé sont à la charge de l'état lorsque les biens laissés par la personne décédée ne suffisent pas à couvrir ces frais (voir *Loi sur les laboratoires médicaux, la conservation des organes et des tissus et la disposition des cadavres*, LRQ, chapitre L-0.2, art. 60).

[99] Voir c. 1177, § 3. Ce qui est dit au sujet des funérailles peut aussi être appliqué au lieu de sépulture.

[100] Voir P.-G. ROY, *Les cimetières de Québec*, Lévis, Quotidien, 1941.

bec demandait aux curés de dissuader leurs paroissiens de choisir, dans leur testament, l'église comme lieu de sépulture, et cela principalement pour faute d'espace et pour des raisons d'hygiène[101]. Le Code de 1917 a lui aussi imposé des restrictions universelles toutefois encore moins étroites que celles d'aujourd'hui (voir c. 1205, § 2 du *CIC*/17). L'Église catholique au Québec a également voulu encadrer la pratique en faisant insérer à la loi civile québécoise une obligation de se rapporter à l'autorité ecclésiastique compétente avant de procéder à toute inhumation dans une église ou chapelle[102].

Nous pouvons également nous poser la question à savoir s'il est possible d'utiliser une église pour fin de columbarium. L'assemblée des évêques du Québec a tenu un sondage sur la question : « Les résultats révèlent que la majorité [des diocèses du Québec] […] n'accepte pas l'établissement d'un columbarium dans une église »[103]. Dans le canon 1242, le terme cadavre comprend aussi bien les corps que les cendres cinéraires, ce qui exclu la possibilité de ce double emploi (église et columbarium). Toutefois, l'évêque diocésain peut dispenser ce genre de loi universelle pour le bien spirituel des fidèles (c. 87, § 1). Si l'église est toute destinée au culte divin (c. 1214), la sépulture à l'intérieur de celle-ci n'est pas contraire à sa vocation car le canon 1242 le permet pour certaines personnes déterminées. Il est vrai que le fait de recevoir des sépultures n'est pas la vocation propre d'une église (et c'est ce que le droit universel manifeste), mais il peut arriver que, pour des situations particulières, l'évêque d'un diocèse en juge autrement[104]. Dans tous les cas, aucun cadavre ou urne cinéraire ne doit être placé sous l'autel (c. 1239, § 2).

3.4 — Particularités orientales

Puisque les cimetières catholiques romains peuvent servir de lieu de sépulture aux fidèles catholiques de rite oriental, il est de mise de relever les quelques différences qui séparent les deux Codes en la matière. Le Code des canons des Églises orientales ouvre la section sur les cimetières et les funérailles ecclésiastiques en énonçant le droit de l'Église à posséder ses propres cimetières (c. 874, § 1, *CCEO*), ce qui n'est toutefois pas différent du Code latin qui l'affirme tout autant, bien que de manière implicite. Les plus

[101] Voir *Rituel du diocèse de Québec*, 2e édition, Paris, Simon Langlois, 1703, p. 289.

[102] Voir *Loi sur les inhumations et les exhumations*, LRQ, chapitre I-11, art. 7.

[103] *CPCQ*, p. 8.

[104] Il semble que les États-Unis aient adopté la politique d'éviter les columbariums dans les églises (voir *Guidelines*, p. 32).

grandes divergences se retrouvent au canon 876, § 2 (*CCEO*). Si les deux Codes ouvrent la porte pour offrir les funérailles aux enfants morts avant le baptême et dont les parents avaient l'intention de faire baptiser, le Code oriental précise cependant que cet accès doit être accordé au jugement *prudent* du hiérarque du lieu. Cette recommandation à la prudence laisse entendre que le hiérarque du lieu devra juger au cas par cas. Du côté latin, l'ordinaire du lieu pourrait bien accorder cet accès de façon générale pour son territoire, laissant le soin à chaque curé de recourir à son avis pour des cas particuliers. Au même canon 876, § 2, le Code oriental est seul à mentionner les possibles funérailles pour d'autres personnes non-baptisées qui sont considérées proches de l'Église[105]. Une autre différence s'observe au sujet des sépultures dans les églises ; le canon 874, § 3 du Code oriental est plus permissif que le canon 1242 du Code latin quant à la liste de ceux qui peuvent y être ensevelis. Le Code des Églises orientales mentionne, en plus des patriarches, les évêques en général (plutôt que les évêques diocésains seulement du côté latin) et y ajoute les exarques. Toutefois, dans le Code latin, les coutumes contraires ne sont pas réprouvées (ce que fait expressément le *CCEO*), ce qui pourrait laisser place à des extensions de la loi, selon des coutumes locales.

Conclusion

Les fidèles catholiques québécois peuvent mourir en paix ; des lieux de repos dignes de leur croyance leur sont disponibles et garantis par la législation étatique. Toutefois, dans une société séculière, il leur est aussi offert des produits et services par des compagnies privées, y compris un lieu de sépulture « profane ». De plus, si ces fidèles choisissent l'incinération, il leur appartient de suivre les dispositions de l'Église sur le traitement des cendres, car les lois du Québec leur laissent toute liberté en la matière. Du côté des dirigeants de l'Église, ils se doivent d'être bien éclairés sur les différentes possibilités légales de posséder et d'administrer les cimetières afin de tirer le meilleur parti des lois civiles, selon leur situation propre. Ainsi dans certains cas, des paroisses ont tout avantage à laisser la propriété et la gestion de leur cimetière à une compagnie de cimetières qui aura plus de moyens et de compétence pour les administrer. En d'autres circonstances, une paroisse qui voudrait, en marge de ses activités de cimetière, offrir des

[105] Voir T. J. GREEN, « Selected Issues in Divine Worship / Sacraments in the Latin and Eastern Codes : A Comparative Study », dans *Studies in Church Law*, 4 (2008), p. 105.

services funéraires connexes devrait choisir de céder son cimetière à une compagnie de cimetière créée par une loi particulière puisque la fabrique est limitée dans le type de service qu'elle peut dispenser. Quant aux administrateurs de cimetières, ils doivent être au fait des principes de gestion modernes qui leur permettra d'assurer la pérennité du patrimoine de l'Église. Ils doivent aussi être habilités à dresser un règlement de cimetière clarifiant ainsi la portée des contrats avec les concessionnaires et évitant des conflits éventuels.

Enfin, les lois ecclésiastiques concernant les cimetières et la sépulture des fidèles manifestent la compréhension du sacré que s'en fait l'Église. Ce n'est pas tant le terrain qui est sacré que les personnes qui y sont enterrées (enfants de Dieu toujours vivants dans la foi) ; la profanation n'est pas liée *ipso facto* à des gestes extérieurs, mais au possible scandale qu'elle peut provoquer chez les fidèles. Et si l'Église se doit de refuser la sépulture ecclésiastique à certains individus, ce n'est pas dans un esprit de condamnation, mais pour garder ferme la foi des fidèles (le cimetière étant le lieu des croyants), cette foi se faisant visible lorsqu'une personne est en communion avec l'Église, corps du Christ. En prenant soin de ses cimetières, tant sur le plan de l'aménagement physique, de la gestion administrative que du respect du sacré, l'Église crée un espace où la dignité des croyants comme enfants de Dieu est reconnue, où le mystère de la foi en la résurrection de la chair est manifesté et où la vénération de la mémoire des défunts par la prière est favorisée. Le cimetière catholique se veut un signe de la communion des saints qui est l'Église toute entière et de tout âge unie à son chef, le Christ.

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RECENSIONS — BOOK REVIEWS

Massimo DEL POZZO, *Il magistero di Benedetto XVI ai giuristi. Inquadramento, testi, e commenti*, Studi Giuridici 102, Vatican City, Libreria Editrice Vaticana, 2013, 205 p. — ISBN 978-88-209-9128-9 — € 25,00

On 11 February 2013, the world witnessed an ecclesial event of historic significance: the resignation of the Supreme Pontiff, Pope Benedict XVI. This very public consummation of the pontificate of not only a great churchman but also a highly regarded theologian, who uniquely still lives in our midst, naturally created a timely opportunity to explore his contributions as Pope to the various areas of ecclesial life. Canonists are particularly attuned to his teachings in regards to juridical questions, especially in view of the fact that, as Pope St. John Paul II declared in his final discourse to the Tribunal of the Roman Rota, the ordinary pontifical Magisterium "has juridical weight insofar as it concerns the sphere of law" (*AAS*, 97 (2005), p. 166, nº 6). It is these factors that give rise to this volume.

While somewhat thin, it is rich in content; after a seven page preface written by Julián Cardinal HERRANZ and an introduction of the author, it is divided into three sections. The first section is a 55 page essay entitled, "The Juridical Ministry of Benedict XVI," which synthesizes and analyzes the teachings of Benedict XVI on juridical questions. First, it summarily highlights the juridical activities of Benedict XVI: in sub-sections describing him as legislator, administrator and judge, the author explores his legislative output, his administrative interventions (e.g., provisions for particular churches, lifting the excommunications of the bishops of the SSPX, etc), and his judicial sensibility. Then, it synthesizes the teachings emanating from meetings with various groups (e.g., the Roman Rota, heads of state, diplomats, etc), from other documents (e.g., the encyclical *Caritas in veritate*), and from sources of non-magisterial teachings (e.g., book-length interviews). It finally expounds upon a number themes found throughout his teachings pertaining to law, rationality and justice.

The second section consists of the text of five major discourses of the Pope, each followed by the author's commentary. These were previously published in the journal *IE* of the Faculty of Canon Law at the Pontifical

University of the Holy Cross (Rome), in which the author is a professor. The third section is the appendix, which furnishes a list of Benedict XVI's chief legislative acts and a list of his formal discourses as Pope having juridical import. These lists lack any citations from the *AAS* or other publications, whose inclusion, in a book of this nature and otherwise high scientific quality, would not have been too much for the reader to expect.

This book stimulates much reflection on the juridical implications of pontifical teachings and the relationship between the thought of the man who is Pope and the institution of the Pope as teacher. The juridical and theological sciences would do well to draw inspiration from the author's efforts encapisulated in this book, and even to enter into a comparative investigation of the relationship between the thought of Benedict XVI as supreme teacher of the Church and that of Joseph Ratzinger as teologian. In this regard, the author is successful in presenting a book that "constitutes in practice an invitation to the reading and the study" (p. 17) of what Benedict XVI accomplished in his pontificate as legislator and teacher.

William L. DANIEL

Cosimo IANNONE, *Il valore della giurisprudenza nel sistema giuridico canonico*, Dissertationes Series Canonica 30, Rome, EDUSC, 2012, 334 p. — ISBN 978-88-8333-278-4 — € 18,00

This is a doctoral dissertation defended at Santa Croce University on the value of jurisprudence in the canonical system. The A.'s understanding of "jurisprudence" is not limited to the body of decisions of one or more particular courts but refers to the doctrine underlying judicial decisions, that is, the totality of the criteria used by tribunals for the solution of cases. Thus, the A. sees canonical jurisprudence as beginning with the works of Ivo of Chartres and Gratian, both of which were private collections but which offered a scientific basis for the interpretation of laws and the solution of cases. Beginning in the twelfth century, collections of papal decretals were an important source of jurisprudence and, especially after Trent, the decisions of Roman dicasteries. Today, the Roman Rota and, increasingly, also the Apostolic Signatura, are the most influential sources of jurisprudence throughout the Catholic Churches, East and West.

The first of the three chapters of the book is on the concept of jurisprudence in Roman law, Anglo-American common law, Italian civil law, and canon law. The second chapter considers the jurisprudential activity of the Apostolic Penitentiary, the Supreme Tribunal of the Apostolic Signatura, the Roman Rota, the

Congregation for the Doctrine of the Faith, and local tribunals. The A.'s own comments, however, strongly suggest that the Penitentiary and CDF have little or no role in creating jurisprudence. Although *Pastor bonus* attributes to the Penitentiary the first place among the tribunals of the Holy See, the A. notes that canonical doctrine is unanimous that it is not a tribunal in the usual sense of the term. It is a tribunal of voluntary jurisdiction in the internal forum. In reaching decisions on whether to grant favours, it enjoys the broad discretion typical of the administrative power of the Church which, the A. says, makes this tribunal more like a Roman congregation or pontifical council. Thus, it really does not offer jurisprudence but the formation of an administrative praxis, a uniform manner of resolving juridical questions. As for the CDF, it exercises judicial or executive power in penal cases, but it does not publish its penal sentences or decrees. The A. says this represents a great limitation even for its own operations, especially since the Congregation has relied on judges *ad casum* who may lack sufficient independence of judgement. The A. agrees with Eduardo Baura's proposal that the rights of the faithful would be better protected if the CDF's penal competence would be transferred to a stably erected apostolic tribunal that has a section specially devoted to penal cases.

The third and final chapter treats the divulgation of the jurisprudence of the Holy See, that is, making available to the public the sentences and decrees as opposed to just publishing them to the parties to a case. Regarding the Signatura, the A. laments the fact that it has no official and complete publication of its own sentences and decrees. He argues compellingly that all its decisions should be published, edited for anonymity, because a consistent jurisprudence cannot be known if only isolated cases are selected for divulgation. He says the same of the Rota which, though regularly publishing its jurisprudence, is selective in what gets published. This selectivity cannot give a complete picture of Rotal jurisprudence and has two inherent dangers: the risk of publishing only the best sentences and the danger that auditors may choose certain sentences for publication as a way of promoting their own jurisprudential tendencies. The A. offers some ideas for a more effective divulgation of Rotal jurisprudence. Among them, he suggests that the Rota put all its sentences on a website that could be accessed by local tribunals around the world. As for the problem that many tribunal officials do not read the Rotal sentences because they are in Latin, the A.'s solution is that they should learn to read Latin. He praises Latin as being "extremely precise, very articulate, not subject to evolving interpretations, and a fundamental and special part of the canonical tradition" (p. 300).

The titles in the thirty-one page bibliography are, for the most part, closely focused on the topics treated in the work. A notable omission,

perhaps unavoidable given the closeness of the publication dates, is William Daniel's collection of jurisprudence of the Apostolic Signatura, *Ministerium iustitiæ*, which was published in 2011 by Wilson & Lafleur in its distinguished Gratianus Series.

John M. HUELS

Marek JĘDRASZEWSKI and Jan SŁOWIŃSKI (eds.), *Quod iustum est et aequum: Scritti in onore del Cardinale Zenone Grocholewski per il cinquantesimo di sacerozio*, Poznań, Archdiocese of Poznań, 2013, 614 p. — ISBN 978-83-87487-79-9

This is a festschrift honouring Cardinal Zenon Grocholewski, Prefect of the Congregation for Catholic Education since 1999, on the occasion of his fiftieth anniversary of priesthood. The work is prefaced with accolades from Pope Francis, Pope Benedict, the Archbishop of Poznań, the Dean of the College of Cardinals, the Primate of Poland, the Apostolic Nuncio in Poland, and the officials of the Congregation for Catholic Education.

The body of the work is divided into three parts with brief studies in the dominant modern languages of canon law: Italian (twenty-seven studies), English (eleven), German (eight), French (seven), and Spanish (three); the studies by Polish authors are mainly in Italian. The first part consists of essays related to the life and career of G., including his service on the Apostolic Signatura as Notary (1972-1977), Vice Chancellor (1977-1980), Chancellor (1980-1982), Secretary (1982-1998), and then Prefect of the Tribunal (1998-1999). The remainder of the work is comprised of short studies on diverse topics grouped under the headings of Canon Law (Part Two) and Education (Part Three), two broad areas that reflect G's own academic and professional interests.

While Part Three will be of particular value to canonists and others concerned with various aspects of Catholic education, the studies of Part Two cover diverse areas of canon law including judicial procedures, administrative procedures and jurisprudence, general norms, penal law, marriage, temporal goods, seminaries, personal circumscriptions, and clergy. Many of the contributors are well known to canonical doctrine, among them Philip Brown, Cardinal Raymond Burke, Cardinal Péter Erdö, Jósef Krukowski, Joaquín Llobell, Klaus Lüdicke, Nikolaus Schöch, and Hugo Schwendenwein. The names of some of the other authors, especially those from Poland, may be new to the English-speaking canonists, but their contributions offer a glimpse of the quality of their scholarship.

Beautifully designed and sizeable in both length and dimensions, this is a tome worthy of display. It is a fitting tribute to an accomplished canonist and dedicated servant of the Church.

John M. HUELS

Norbert LÜDECKE and Georg BIER, Das römisch-katholische Kirchenrecht. Eine Einführung, Stuttgart, Kohlhammer Verlag, 2012, 279 p. — ISBN 978-3-17-021645-7 — € 29,00

The traditional diploma-program in theology in Germany has been changed due to the Bologna-process and its modification into a standardized bachelor/master program. Consequently, traditional lectures in canon law had to be modified. The new program adapted the concept of various modules in which canon law is to be taught at German universities. The presented study, a redesigned introduction into canon law, is presented for students of the theology program in which canon law is to be taught. The various proposed modules offer not only an introduction and first systematic overview but also practical and everyday matter units. These units are related to each other but they can also be taught individually.

The systematic composition of each module can be applied to all units presented. The authors intend to present the law of the Latin Church based on the norms of the Code of canon law. Priority of the various modules is on the teaching office of the Church, the inner structure of the Catholic Church and the sacraments. Other units such as general norms, temporal goods, penal law, etc. are included if necessary.

Starting point of each unit presented are specific questions and problems arising such as ordination and celibacy, aspects of synodality and co-determination, the canonical status of women in the Catholic Church, pastoral care of parishes in times of shortage of priests and lack of vocations, as well as other current problems in the Catholic Church such as sexual abuse cases in the context of penal law.

Each main topic is subdivided into smaller units, including not only references to the Code of canon law but additional documents. Furthermore, they also include graphics and schemata for a better understanding of the material presented. For a better understanding, the authors also include questions and tasks for the reader, offering solution sketches. To allow a specific follow-up and deepening of the matter presented the authors offer additional bibliography and reading tips in German and English.

This book contains much valuable information and wisdom for undergraduate students of the theology program who will be initially introduced into canon law matters. It is presented in a scientific manner with sufficient footnotes. The methodology adopted serves the purpose of the work well: this introduction into canon law has its focus on a concept-oriented learning following the regulations and challenges of students in the theology program. The reader gains a methodological access to canonical questions and, consequently, an understanding of how canon law is reflected in the self-understanding of the Catholic Church. Canon law will be understood as a systematic-theological discipline and not as an autonomous topic. The reader is presented with rights and obligations that every member of the Church obtains. The authors had access to archival sources, consequently, theology students and those interested in canon law will benefit from a clear presentation of the material presented for a better understanding of the Catholic Church, its structures and how the Church operates.

Michael NOBEL

Luis NAVARRO and Fernando PUIG (eds.), *Il fedele laico. Realtà e prospettive*, Pontificia Università della Santa Croce, Monografie giuridice 41, Milan, Giufffè Editore, 2012, xvii+520 p. — ISBN 9788814173844 — € 53,00

À la suite de la mise en valeur par le concile Vatican II du rôle et du statut juridique des fidèles laïcs dans l'Église et dans le monde, de multiples études ont paru pour les expliciter. Mgr Angelo Scola les avait réunies en un ouvrage qui faisait déjà 400 pages. Et ce n'était qu'en 1987. De sorte que l'on peut se demander ce qu'il est possible de dire de neuf sur le sujet et même tout simplement s'il vaut la peine de se pencher encore sur lui de nos jours. Les organisateurs du Colloque de 2011, dont les travaux interdisciplinaires sont réunis dans cet ouvrage, n'en doutaient pas. Et la lecture du texte des différentes interventions montre qu'ils ont eu raison. Il ne s'agissait d'ailleurs pas tant dans leur esprit de dresser un état des lieux que d'ouvrir aussi des perspectives. Ceci s'imposait d'ailleurs, car, cinquante ans après la tenue des assises conciliaires, il faut bien avouer que le rôle des laïcs est encore souvent méconnu dans l'Église et qu'une mentalité hiérarchologique est toujours présente chez certains.

Le card. Rylko, président du Conseil pontifical pour les laïcs, a prononcé le discours inaugural portant sur « les fidèles laïcs aujourd'hui: un besoin urgent de revenir à l'essentiel… » (p. 3-8). Il s'y interroge — illustrant ainsi

ce que nous venons de dire — qu'il ne semble pas que les discussions actuelles sur le laïcat comprennent ce qui est vraiment essentiel. Revenir à l'essentiel signifie accorder toute son importance à la rencontre personnelle avec le Christ « en tant qu'événement décisif et fondateur de l'identité chrétienne », redécouvrir l'audace d'une présence « visible et incisive dans la société », et enfin remettre Dieu au centre de sa vie.

L'ouvrage est divisé en trois parties. La première est constituée par les cinq conférences magistrales; la seconde par quinze communications écrites; la troisième par le compte-rendu d'une table ronde. Le professeur Giacomo Canobbio présente « la réflexion théologique sur les laïcs du concile à nos jours » (p. 11-34). Rejetant cinq modèles théologiques qui laissent subsister des ambiguïtés quant à la réalité « laïcs », l'auteur présente un autre modèle, celui du laïc chrétien compris comme le visage symbolique de l'Église tournée vers l'extérieur. Les vocations des laïcs ont en commun le devoir de renvoyer et d'actualiser « symboliquement' cette ouverture innée de l'Église.

« La condition juridique du laïc chez les canonistes du concile Vatican II à nous jours » est étudiée par le professeur Luis Navarro (p. 35-66). Si l'on part du fait que les laïcs agissent dans la société civile, l'on comprend que l'aspect de vocation de la sécularité du laïc n'appelle pas un statut canonique particulièrement développé. Le statut juridique du laïc n'est autre, en dernier ressort, « que le statut juridique commun (de fidèle) avec les nuances et les aspects provenant de la sécularité ». Les laïcs ne sont pas tous appelés à assumer des fonctions « ecclésiales ». Respecter un juste équilibre et les principes qui guident la vocation et la mission des laïcs « est sans nul doute une façon de donner à chacun ce qui lui revient, son droit ».

Le secrétaire de la Commission pontificale pour l'Amérique latine, Guzmán L. Carriquiry Lecour, a parlé du « laïcat du concile Vatican II à nos jours: succès positifs, difficultés et échecs » (p. 67-111). Un demi-siècle après le concile, beaucoup de fidèles laïcs conservent une mentalité cléricale en tant que récepteurs passifs de services ecclésiaux et dans l'absence d'une claire conscience de leurs responsabilités de chrétiens. Après cette remarque, l'auteur souligne que la figure du laïc chrétien trouve sa qualification immédiate, non dans le rapport au prêtre ou au religieux, mais dans la référence directe à Jésus-Christ, selon la caractéristique séculière grâce à laquelle se réalise la nouveauté découlant du baptême, en maintenant la différence entre sacerdoce commun et sacerdoce ministériel, entre état de vie séculière et état de vie religieuse. Il rappelle aussi comment saint Josémaria a été un pionnier de la spiritualité des laïcs. De nos jours, il faut repenser la formation chrétienne des laïcs afin qu'ils puissent vivre leur vocation dans les

circonstances ordinaires de leur vie, notamment dans la famille, le milieu de travail, la politique, l'éducation et la culture.

Le théologien José Ramón Villar fait une présentation des « éléments définissant l'identité du fidèle laïc » (p. 113-143). Chaque vocation particulière dans l'Église est une façon de réaliser la vocation chrétienne. Une confusion s'est produite par assimilation de la sécularité propre à tous les fidèles avec l'*indoles sæcularis* qui qualifie les fidèles laïcs, et constitue donc la façon dont les laïcs doivent vivre leur vocation baptismale dans sa plénitude. Le fait que certains d'entre eux vivent le célibat pour le royaume des cieux n'implique pas de « séparation » du monde au sens théologique, contrairement aux membres de la vie consacrée, chez qui cette « séparation » engendre un changement dans leur rapport avec le monde et comporte un style de vie « exceptionnel » par rapport à celui, « ordinaire », des laïcs.

María Blanco s'intéresse à « la protection de la liberté et de l'identité chrétienne des laïcs » (p. 145-180). Le professeur souligne que ce serait une erreur que de vouloir traduire la doctrine du concile Vatican II sur les laïcs en créant un état ecclésiastique particulier, car ce qui est le propre des laïcs, c'est la sanctification du monde et dans le monde: sanctification qui n'intervient pas par suite d'un changement de statut canonique, mais en vertu de la mise en œuvre du sacerdoce commun de tous les fidèles. S'attardant plus particulièrement à l'autonomie des laïcs dans les réalités terrestres, l'auteur relève qu'il est d'une grande importance de les aider à former leur conscience, en plus de leur assurer les moyens de salut, et présente les limites de cette autonomie.

« La société dans laquelle nous vivons. Ombres et lumières » (p. 181-194). Tel est le titre d'un tableau brossé par Sergio Belardinelli, à partir du mot « crise »: crise de la culture européenne depuis les débuts du siècle dernier. L'auteur montre que la rupture entre christianisme et modernité engendre un individualisme qui menace avant tout liberté et la dignité de l'individu et l'apparition de systèmes sociaux qui fonctionnent de plus en plus comme si les individus n'existaient pas.

S'ouvre alors la deuxième partie de l'ouvrage, qui réunit quinze communications écrites. Nous ne pouvons pas les résumer toutes. Nous nous contenterons de signaler quelques aspects qui, subjectivement, nous paraissent plus significatifs. Vicente Bosch illustre « l'action ecclésiale et l'engagement dans le monde des fidèles laïcs: une distinction insidieuse » (p. 197-213), la distinction en question étant celle de l'action des laïcs « dans l'Église et dans le monde », qui pourrait donner lieu à une sorte de dualisme qui irait à l'encontre de l'unité de vie des laïcs et à la méconnaissance du fait que leur action

dans le monde est marquée du signe de l'ecclésialité vu qu'elle s'exerce sous l'influence de la grâce, et agit pour la justice, le développement et le bien commun, dans l'effort de rapporter toute la création Dieu. « L'appartenance des fidèles laïcs aux communautés hiérarchiques de l'Église » (p. 215-225) est le thème choisi par Javier Canosa pour expliciter l'autonomie légitime de la volonté du fidèle laïc par rapport à sa dépendance juridique d'une communauté hiérarchique déterminée de l'Église, en montrant les changements de dépendance juridique qui peuvent intervenir. Miquel Delgado Galindo présente « Les fidèles laïcs face à la nouvelle évangélisation » (p. 227-251); Miguel de Salis « Le laïc au concile Vatican II. Une réflexion sur les textes dans le contexte actuel » (p. 253-274); Constantion-M. Fabris, « Les droits des fidèles en tant qu'expression juridique des valeurs propres de l'homme baptisé » (p. 275-296); Mattia F. Ferreo, « La liberté des parents d'assurer l'éducation religieuse et morale de leurs enfants conformément à leurs convictions personnelles. Un droit qui l'est plus pacifiquement reçu en Europe? » (p. 297-313); Fabio Franceschi, « L'engagement des fidèles laïcs dans la vie publique entre responsabilité personnelle, liberté et devoir d'obéissance au magistère (avec une référence spécifique à l'enseignement de Benoît XVI) » (p. 315-339): pour que les fidèles puissent construire une société qui respecte le plus possible la dignité de la personne humaine, les fidèles laïcs doivent se voir reconnaître dans l'Église les conditions de liberté et d'indépendance nécessaires à l'accomplissement de leur mission apostolique qui inclut l'instauration de l'ordre temporel, ce à quoi le droit d'enseigner de l'Église hiérarchique doit prendre soin.

Álvaro Lino González Alonso étudie « l'*indoles sæcularis* dans le *cœtus studiorum 'de laicis'*: fidélité au concile » (p. 341-357): de cet examen il ressort que, de toute évidence, la sécularité a été soulignée de toute évidence comme caractéristique spécifique des fidèles laïcs. Philip Goyret examine « la catholicité de l'Église et la mission des fidèles laïcs » (p. 359-369) et marque son étonnement de constater que la diminution de la sécularité va de pair avec l'accroissement de la sécularisation. Lucia Graziano présente en détail « le rôle des laïcs d'agir pour un ordre juste dans la société » (p. 371-397), en insistant spécialement sur les normes des canons 222, 225 et 227. Javier López Díaz s'intéresse à « la vocation et la mission des laïcs dans l'enseignement de saint Josémaria. D'un saint, des lumières à la recherche théologique » (p. 399-423). Cet enseignement part d'une vision profonde de l'Église, conçue comme « une société formée de tous les fidèles, qui sont tous solidairement responsables d'une même mission, que chacun accomplit selon les circonstances qui sont les siennes ». Ramón Pellitero revient sur « la sécularité laïque à notre époque. Présupposés, conditions, conséquences »

(p. 425-441). L'on notera sa remarque sur l'insuffisance de l'explication du rapport entre mariage et condition laïque, qui comporte à la clé le fait que le célibat apostolique ne fait pas obstacle à la condition laïque. M. Pilar Río décrit « le dynamisme apostolique des laïcs et la conscience ecclésiale originaire. Éléments et perspectives pour la nouvelle évangélisation » (p. 443-469). L'on saura gré à Carla Rossi Espagnet de parler de « Marie de Nazareth, laïque chrétienne » (p. 471-490), où il est aussi question de saint Joseph. Enfin Alessio Sarais traite de « l'engagement des laïcs en politique: fondement juridique et magistère de l'Église » (p. 491-506).

Dominique LE TOURNEAU

Iñigo MARTÍNEZ-ECHEVARRÍA (ed.), *Fede, evangelizzazione e diritto canonico*, Pontificia Università Della Santa Croce, Subsidia Canonica 11, Rome, ESC, 2014, 190 p. — ISBN 978-88-8333-307-1— € 20,00

Le 17ème colloque organisé par la faculté de droit canonique de l'Université pontificale de la Sainte-Croix a porté sur le sujet qui a donné son titre à cet ouvrage, qui en rassemble les travaux. Il fait droit au fait que la dimension sociale de la foi, dont le principe suprême d'action est la charité, renferme indéniablement un aspect de justice intraecclésiale. Moyennant quoi, la science canonique ne peut être réduite à une simple technique. La Parole est l'objet d'un droit de toute personne humaine en tant que destinataire du mandat missionnaire. Le baptisé a le droit de conserver la foi reçue et de la transmettre à d'autres. Tous les fidèles participent au droit de l'Église en rapport avec l'authenticité et l'intégrité de l'unique dépôt de la foi. Les ministres ont des devoirs quant au ministère de la Parole et à l'exercice du magistère ecclésial.

Le professeur Errázuriz, un des organisateurs conjointement avec les professeurs Fernando Puig et Martínez-Echevarría, ouvre les débats avec une communication sur « Foi et raison dans la science canonique: les présupposés ontologiques » (p. 13-29). L'auteur entend montrer comment l'approche épistémologique dépend des fondements ontologiques. Il suffit pour cela de voir comment la détermination de la méthode propre de la science canonique est pleinement unie à la conception de l'être même de son objet, c'est-à-dire au fait de savoir ce qu'est le Peuple de Dieu. Dans un deuxième temps, l'auteur s'attache au binôme naturel-surnaturel appliqué à la réalité du droit dans l'Église, selon une perspective refusée par Corecco, mais bien mise en évidence par Hervada, partant du tó díkaion aristotélicien et de la ipsa res iusta thomasienne. L'optique réaliste évite de

placer le droit naturel au cœur du droit canonique et permet de mettre au point la dimension juridique des notions théologiques. L'on échappe ainsi au renvoi à la communion, à la sacramentalité ou au pastoralisme dont certains prétendent qu'ils permettent de dépasser le juridique-ecclésial., alors que le droit, en tant que droit, est intrinsèquement communionnel, sacramentel et pastoral. D'autre part, l'approche du droit comme étant le juste confirme l'intuition traditionnelle selon laquelle la lumière de la foi est nécessaire au canoniste. Si celui-ci n'est pas en harmonie avec la foi, il lui est impossible d'agir correctement dans la recherche du juste dans l'Église.

Le professeur Mauro Rivella aborde ensuite la question des « vérités de foi et munus docendi Ecclesiæ » (p. 31-43) et note que les normes du Livre III du code contiennent des éléments précieux de nature à préciser des droits et des devoirs concrètement exigibles, et donc doté d'une véritable importance juridique. Le premier devoir concernant le Peuple de Dieu est celui d'annoncer la parole, qui doit être ensuite célébrée dans la liturgie et vécue dans la charité, avec en contrepoint le devoir fondamental de la recevoir, qui ne se limite pas à la prédication et à la catéchèse mais doit susciter des processus éducatifs à même d'aider la personne à vivre pleinement sa liberté. Le Peuple de Dieu tout entier a le devoir de conserver et d'approfondir ce bien de la parole. À ce propos, dans l'exercice de son devoir de vigilance l'autorité sera attentive à l'emploi des nouveaux moyens de communication sociale liés à l'internet. L'auteur passe ensuite en revue les divers droits et devoirs des fidèles relatifs à la parole de Dieu.

« Les droits et les devoirs des fidèles laïcs dans le domaine de l'évangélisation: leur participation au munus docendi » (p. 45-62). Ce sujet est traité par le professeur Giorgio Feliciani qui souligne que la mission d'évangélisation est étroitement unie à l'existence vraiment chrétienne de chaque fidèle, c'est-à-dire cohérente avec la foi professée. S'y ajoute le témoignage de la charité des œuvres, en particulier des œuvres de charité et de miséricorde. L'auteur relève l'importance de l'apostolat personnel et individuel, qui ne sous-estime pas pour autant l'apostolat associé, entre autres sous la forme des nouveaux mouvements ecclésiaux qui sont un exemple de la place des charismes dans l'Église, charismes que ceux qui les ont reçus ont le droit et le devoir d'exercer pour le bien des hommes et l'édification de l'Église. Suit une étude des dispositions des canons 211, 216 et 225 § 1, puis des considérations sur la famille en tant que lieu privilégié de l'exercice du munus docendi par les laïcs.

La communication suivante porte sur « les laïcs dans l'Église. D'une catégorie conceptuelle à des éléments dynamiques de la vie chrétienne »

(p. 63-79) et est assurée par le professeur Gaetano Lo Castro. Partant de l'incertitude doctrinale sur les laïcs telle qu'elle se manifeste dans la doctrine, dans l'ancien droit et dans le code de 1917, l'auteur note qu'une nouvelle compréhension des rapports de l'Église avec le monde, tant dans *Lumen gentium*, n° 31, que dans *Apostolicam actuositatem*, n^os^ 5 et 7, a permis de mieux comprendre la nature et la mission des laïcs. Il réfute des propositions post-conciliaires d'un secteur doctrinal qui s'exprime en opposition aux enseignements précités, lesquels offrent la meilleure clé de lecture du canon 225 du CIC (et du c. 401 du CCEO), et permettent d'affirmer que la sanctification des laïcs dans les réalités temporelles est une partie essentielle de leur condition et de leur vocation ecclésiales. Enfin l'auteur se livre à une évaluation critique de la sécularité en tant que condition des baptisés, faisant remarquer que la sécularité ne doit pas être entendue d'un point de vue sociologique, comme la situation dans le monde, mais du point de vue théologique, c'est-à-dire en tant que vocation, qui exige une réponse, à vivre dans les dimensions temporelle et humaine pour les reconduire à Dieu, leur créateur.

Le professeur Francisca Pérez-Madrid étudie le sujet suivant: « Identité religieuse et liberté d'expression: considérations sur l'incitation à la haine ou 'Hate Speech' » (p. 81-104). Pour le Conseil de l'Europe, le sentiment religieux mérite d'être protégé pénalement en tant qu'expression de la personnalité, que moment central d'une dignité existentielle de l'homme. Mais ses recommandations contre le racisme et l'intolérance ne visent directement que l'islam et le judaïsme. Les Nations-Unies ont adopté quant à elles des résolutions sur la diffamation des religions, mais en insistant sur la nécessité de protéger l'islam et les musulmans… L'auteur constate que la diffamation des religions, telle qu'elle est envisagée dans les textes internationaux, « pourrait conduire à empêcher la liberté d'expression en public, ou une sorte de contrôle a priori de ce qui est religieusement correct de la part de groupes majoritaires, en particulier dans les pays islamiques où la pleine reconnaissance des droits et des libertés fondamentales n'existe pas ». Elle souligne aussi que dans le cas de la diffamation des religions, le sujet passif est toujours la croyance, le système religieux, alors que dans le cas de l'incitation à la haine il s'agit d'une personne ou d'un groupe de personnes identifié par un critère déterminé considéré comme intolérable. Elle en conclut que la formule en vigueur pour condamner la diffamation des religions « présente plus de risques et de dangers que d'avantages ».

« La protection de l'inspiration chrétienne dans les institutions médicales, éducatives et d'assistance: le cas Obamacare » est traité largement par le professeur Íñigo Martínez-Echevarría (p. 105-132). Il montre les

difficultés rencontrées par les institutions d'inspiration chrétienne face à l'administration du président Obama, visant à imposer des pratiques qu'elles ne peuvent accepter, et à les faire financer directement ou indirectement pas ces établissements. La conférence des évêques des États-Unis est intervenue à plusieurs reprises pour essayer d'infléchir les dispositions gouvernementales, mais les accommodements obtenus n'en modifient pas le contenu de fond. L'auteur envisage ce qui pourrait se produire si les réclamations en cours devaient aboutir à la Cour suprême. Le premier défi pour les requérants consistera à prouver que l'obligation de mettre à disposition leurs propres structures pour réaliser des actes de contraception et de stérilisation comporte une grave atteinte à la liberté de conscience, de pensée et de religion des employeurs, des assureurs et des travailleurs qui présentent des objections morales à ces types d'actes. Si la Cour suprême constate cette grave atteinte, le gouvernement devra démontrer, d'une part que la limitation de la liberté religieuse contenue dans le contraception mandate est nécessaire pour garantir un intérêt étatique auquel il ne peut renoncer et, d'autre part, qu'il n'existe pas de solution alternative, moins restrictive de la liberté religieuse pour défendre cet intérêt.

Le professeur Andrea D'Auria aborde longuement la question du « droit missionnaire dans la vie de l'Église. Questions problématiques ouvertes » (p. 133-171). Il affirme que la structure juridique de l'Église s'est développée de façon à répondre aux exigences missionnaires et de résoudre les problèmes nés de l'activité *ad gentes*, soulignant en même temps que le droit missionnaire a contribué au développement du droit universel, ainsi qu'à son adaptation continuelle aux exigences normatives qui se sont fait jour au fil des siècles. Il relève à cet égard l'influence du concile Vatican II en matière de discipline matrimoniale et de participation des laïcs aux offices ecclésiastiques et à leur coopération au pouvoir de gouvernement. Après avoir développé les apports du concile et le droit missionnaire tel qu'il est arrêté par le CIC, ainsi que les éclaircissements apportés par l'encyclique *Redemptoris missio*, du pape Jean-Paul II, l'auteur relève que le droit missionnaire n'apparaît plus comme un droit spécifique figurant à côté du droit commun, mais comme un droit particulier au sein de l'ordre juridique commun de toute l'Église.

Enfin le professeur Fernando Puig présente « les instruments juridiques de l'organisation ecclésiastique pour une garantie fidèle de la doctrine et de la morale » (p. 173-190), afin de mettre en évidence la portée juridique de la fidélité doctrinale et morale en ce qui concerne l'action institutionnelle de l'Église et de détailler ensuite les moyens existants pour garantir ladite fidélité dans l'exercice des fonctions publiques dans l'Église, que ce soit de

façon préventive (formation des individus pour qu'ils puissent remplir correctement leurs fonctions publiques; *professio fidei* et serment de fidélité; authenticité du témoignage personnel dans l'organisation ecclésiastique; formation et qualification à un niveau professionnel; domaine de la charité, la doctrine et la morale ne pouvant pas être neutres dans ce domaine) qu'*a posteriori*. Dans ce dernier cas, l'auteur laisse de côté les sanctions pénales d'excommunication, d'interdit et de privation de l'office ecclésiastiques pour s'intéresser à la suspense, aux remèdes pénaux, au renvoi et au transfert d'un office ecclésiastique.

Dominique LE TOURNEAU

Mirosław SITARZ, *Competencies of Collegial Organs in a Particular Church in the Exercise of Executive Power according to the Code of Canon Law of 1983*, Tomasz PAŁKOWSKI (trans.), Faculty of Law, Canon Law and Administration, John Paul II Catholic University of Lublin 7, Lublin, Wydawnictwo KUL, 2013, 274 p. — ISBN 978-83-7702-764-6

Father Mirosław Sitarz is the director of the Department of Public and Constitutional Church Law at the John Paul II Catholic University of Lublin. This work is his dissertation which studies the democratisation in the Church which was promoted by Vatican Council II. He acknowledges that the democratisation of the Church cannot be understood in the same way as in national communities based on the natural law. Instead, democratisation in the Church must reflect the theological premise which understands the Church to be a divine-human community rooted in the divine positive law. Vatican Council II had acknowledged the Church as both a community of the People of God and a hierarchically structured community: any ecclesiology, any legislation, any democratisation must take into account these two elements.

The author divides the dissertation into two parts, The first part deals with substantive law on collegial bodies which exercise executive power in the Church. He addresses the fundamental principles to be observed between the diocesan bishop and collegial bodies (both single-person and multi-person organs). He identifies the various collegial bodies (mandatory and facultative) and discusses at length their various competencies: governance, consultative, creative, representative, liturgical, mediation, and coordination. He distinguishes how these collegial bodies function *sede plena*, *sede impedita*, and *sede vacante*.

The second part presents the legal norms which regulate the procedure of exercising the competencies of the collegial bodies. The author contends

that the object of any competent activity of collegial bodies is a singular administrative act, substantiated as an act of consent, opinion, or choice: this is the chief and common competency of collegial organs. He explains the process involved in the realization of these administrative acts, which varies according to their object and the particular circumstances of the particular Church. He demonstrates that only the college of consultors is able to employ governance competencies and that it can do this only *sede vacante* and *sede impedita*. He identifies a number of areas which invite either clarification by the Legislator or the establishment of particular law by the competent ecclesiastical authority.

Sitarz concludes that the postulates of Vatican Council II calling for the democratisation of the Church are reflected in the 1983 Code of Canon Law, both in the articulation of the rights and duties of all the Christian faithful and in the establishment of new collegial organs with distinct competencies in the particular Church. He concludes: Democratisation facilitates all the faithful along with a diocesan bishop to build proper relations necessary for building the Church a divine and human institution (p. 240).

The work closes with an extensive bibliography, largely in Polish. Indeed, if this work is reprinted, additional bibliographical material in other languages would be a welcome modification.

This work is a most worthy addition to the resources of Church leaders, canonists, and all who wish to discern clearly the impact of the ecclesiology of Vatican Council II on the 1983 Code and who wish to instill that ecclesiology into the daily life of the particular Church. The author is to be commended on a dissertation well written and pertinent to the life of the Church in today modern world.

John A. RENKEN

Patrick VALDRINI, *Comunità, persone, governo: Lezioni sui libri I e II del CIC 1983*, Utrumque Ius 32, Vatican City, Lateran University Press, 2013, 340 p. — ISBN 978-88-465-0876-8 — € 32,00

The A. is a professor in the Institutum Utriusque Iuris of the Pontifical Lateran University and former Dean of the Faculty of Canon Law of the Institut Catholique of Paris. This book is a reworking of his course notes on Books I and II of the Code, excluding the canons on institutes of consecrated life and societies of apostolic life. It is a basic textbook which introduces the law and the canonical doctrine without going into much detail on any subject.

The work is organized in three parts under the headings of the work's title: community, persons, governance. Part I has three major sections covering the organization of the particular Churches, groupings of particular Churches, and the supreme authority of the Church. The second part has six chapters on physical persons in the 1983 Code, the states and participation of persons, obligations and rights of all the faithful, obligations and rights of the laity and the clergy, juridic persons, and associations. The five chapters of Part III treat offices, the power of governance, juridic acts, sources of canon law, and acts of executive power.

The author's approach is factual and objective, giving summary statements of the law and pertinent canonical doctrine. When there are different viewpoints in the doctrine, he generally presents his own thinking, which gives this work greater value. For example, some authors distinguish "voluntary" juridic facts from juridic acts and involuntary juridic facts. Such voluntary juridic facts are acts that are intentional and produce juridic effects, but these effects are recognized in law irrespective of the actor's intention to bring them about. An example of such an act is the commission of a canonical delict which has the effect of making the offender liable to a penal process, even though he had no intention of realizing this effect. The A. himself, however, does not find that this distinction adds any clarity to the notion of the juridic act or juridic fact for, although such a juridic fact is a voluntary act, the intention of the actor, he says, is "absolutely irrelevant" in law. Similarly, the A. questions the need to distinguish, as some canonists have done, the juridic act from the negotium iuridicum (juridic "business" or "affairs"). According to this distinction, the effect of the juridic act is determined by the law (e.g., the effects of administrative acts), while the effect of the negotium iuridicum depends upon the will of the author of the act (e.g., the effects of a contract). The notion of the negotium iuridicum has it origins in German legal doctrine and German civil law. The A., however, does not find it relevant for the study of canon law in which the notion of the juridic act is inclusive of both public and private acts.

There are no footnotes, but bibliographical indications of the canonical doctrine are ample, even if somewhat difficult to access. Apart from the general bibliography on Books I and II of the Code, the other bibliographies are dispersed throughout the work at the end of each chapter and are in chronological order by date of publication rather than alphabetical order by author's surname. A very brief subject index concludes the work; an index of canons would be more useful for research.

John M. HUELS

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BIOGRAPHICAL NOTES

DANIEL, William L.

Born in Madison, Wisconsin, U.S.A., on 20 March 1980. B.A. in Philosophy (Saint Mary's University, Winona, Minnesota – 2002); J.C.L. (Saint Paul University, Ottawa, Ontario – 2006). In the Diocese of Winona, Minnesota, U.S.A.: Judge (August 2008-present), Vice-Chancellor (January 2007-present), Interim Director of the Office of Divine Worship (August 2010-present), Defender of the Bond, Advocate and Promoter of Justice (January 2007-August 2008). He has published articles, book reviews, and translations in *Studia canonica*, *The Jurist*, *Ius Ecclesiæ*, *Studies in Church Law*, *Roman Replies and CLSA Advisory Opinions*, *CLSA Proceedings*, and *Homiletic and Pastoral Review*. He served as editorial assistant for Studia canonica (2005-2008) and for *Canon Law Digest*, vol. 13. His translation of Prof. Javier Hervada's *¿Qué es el derecho?* is published in the Gratianus Series under the title, *What is Law? The Modern Response of Juridical Realism. An Introduction to Law* (Montréal, Wilson & Lafleur, 2009). He also published, in the Gratianus Series, *'Ministerium Iustitiæ': Jurisprudence of the Supreme Tribunal of the Apostolic Signature. Official Latin with English Translation* (Montréal, Wilson & Lafleur, 2011). He entered the sacrament of marriage with Meredith on 19 June 2004, and they have been blessed with four sons.

DION, Michel D. J.

Né à Zenon Park, SK, le 29 septembre 1971, il s'enrôle dans les Forces canadiennes en 1989 et devient aumônier militaire en 1999. Il est ordonné diacre (permanent) pour l'Ordinariat militaire catholique romain du Canada en 2006. En 2008, il effectue un déploiement de sept mois à titre d'aumônier sénior du Groupement tactique du contingent canadien à Kandahar, Afghanistan. Il détient un B.A. en études militaires et stratégiques avec mineure en psychologie militaire et leadership (Collège militaire royal de Saint-Jean, Saint-Jean-sur-Richelieu, QC, 1993) ; un B.Th et M.A. (Th) (Université de Montréal, 1998, 2003) ; et un J.C.L. (Université saint Paul, 2012). Il est

présentement le chancelier et modérateur du Tribunal ecclésiastique de l'Ordinariat militaire catholique romain du Canada, situé à Ottawa, ON. Il est marié à Annie Bisaillon depuis 1996 et ensemble ils ont quatre fils.

EASTON, Frederick C.

Monsignor Frederick C. Easton was born in Bloomington, Indiana on 6 July 1940 he was ordained to the priesthood for the Archdiocese of Indianapolis on 1 May 1966. In 1969 he was awarded the license in canon law from the Pontifical Lateran University in Rome. In the archdiocese, notary (1969-1976); vice officialis (1976-1980); vicar judicial (1980-2011) and adjunct vicar judicial (2011-present). He was secretary of the CLSA (1994-1996); vice president (1997-1998); president (1998-1999). In October 2002, he was appointed the chairperson of the CLSA special task force with a mandate to prepare the "Guide to the Implementation of the U. S. Bishops' Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons." In October 2003, he received the CLSA Role of Law Award. He has also served as a member of the committee for Canon Law Digest and on the committee for future initiatives. He has written and lectured extensively. He is a member of the CLSA and the CLSGBI. He retired from administration in 2011 and now lives in a condo in Bloomington, Indiana where he gives sacramental assistance but also serves as advocate in penal and administrative cases as well as judge in penal trials. In 2012 he spent seven months in a personal sabbatical studying penal law and process at Catholic University of America and in Rome.

GALLARO, George D.

Born in Sicily in 1948 and ordained priest in 1972. After his philosophy studies in Sicily, and theology in California, he studied at the Pontifical Oriental Institute of Rome obtaining his licentiate and doctorate in Eastern Canon Law; he also earned a licentiate in Ecumenical Theology at the Pontifical University of St. Thomas and a certificate in Liturgical Theology at the Pontifical Liturgical Institute, both of Rome. He has been teaching at the Melkite Seminary in Boston and the Byzantine Seminary of Pittsburgh; he also has been serving the Eparchy of Newton and the Archeparchy of Pittsburgh as Vicar Judicial and Syncellus for Canonical Services, and the Archeparchy of Philadelphia as an Appellate Judge.

MICHOWICZ, Przemysław, OFM Conv.

Member of the Order of Friars Minor Conventual of the Polish Province of Krakow. He was awarded a doctorate in *Utroque Iure* in 2013, having

defended his thesis concerning the procedural problems of the administrative process for the dismissal from religious institutes as seen in canon 696. The areas of scientific research of interest are, primarily, canon law for religious, administrative canon law, and comparative law. A number of articles by the author in these areas of interest are awaiting publication in several international juridical periodicals.

MURRAY, Donal

Born in Dublin, Ireland on 29 May 1940. Ordained to the priesthood for the Archdiocese of Dublin on 22 May 1966. Ordained to the episcopate on 18 April 1982. Seminary studies: Holy Cross College, Clonliffe, Dublin 1958-1962. University studies: University College, Dublin 1958-1962 Philosophy (B.A. 1961, M.A. 1962). Saint Patrick's College, Maynooth 1962-1966 (B.D. 1965). University of St Thomas, Rome 1966-1969 (S.T.L. 1967, D.D. 1969). Lecturer in Moral Theology Mater Dei Institute, Dublin, 1969-1982; Professor of Moral Theology, Holy Cross College, Clonliffe, 1970-1982; Lecturer in Catechetics, University College, Dublin, 1976-1982. Auxiliary Bishop of Dublin 1982-1996. Bishop of Limerick 1996-2009. Member of the Joint Working Group between the Roman Catholic Church and the World Council of Churches (1999-2005). Member of the Pontifical Council for Culture (1982- present). Bishop Emeritus of Limerick (2009-present).

RENKEN, John A.

Born in Carlinville, Illinois, on 18 January, 1953. Holds a B.A. in Philosophy (Cardinal Glennon College, Saint Louis, 1975); M.A. in Civil Law (University of Illinois, Springfield, 1988); S.T.D. in Dogmatic Theology, (Pontifical University of Saint Thomas Aquinas, Rome) and J.C.D. (Pontifical University of Saint Thomas Aquinas, Rome, 1981). He served in multiple positions in the Diocese of Springfield in Illinois: parochial vicar, co-pastor, A priest-moderator, vice-chancellor, chancellor, episcopal vicar and moderator for canonical affairs, vicar general, moderator of the curia, judicial vicar, director of the permanent diaconate. He was president of the CLSA (1999-2000); chair of the committee for the 1999 CLSA translation of the CIC; advisor to the USCCB Committee on Canonical Affairs (2003-2005); visiting professor of canon law in the summer JCL program at The Catholic University of America (1989-2006). He has lectured widely and his articles appear in many canonical journals. Presently, professor and vice-dean in the Faculty of Canon Law, and editor of *Studia canonica*, Saint Paul University, Ottawa.

ST-LAURENT, David

Né à St-Bonaventure, Québec, Canada, en 1975. Il s'est marié avec Kimberly en septembre 2006, et le couple a maintenant quatre enfants. Il a fait ses études en théologie à l'université Laval (Québec) et il a complété une licence en droit canonique à l'Université Saint-Paul, Ottawa en 2012. Il a occupé diverses responsabilités dans le mouvement laïc La Rencontre; il a été aumônier en milieu carcéral au pénitencier fédéral de Drummondville (2009-2010). Depuis janvier 2013, il est vice-chancelier au diocèse de Nicolet (Québec, Canada).